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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE RICHARD SEEBORG

ANGEL FRALEY, et al.,)
)
Plaintiffs,)
)
VS.) NO. C 11-1726 RS
)
FACEBOOK, INC.,) San Francisco, California
Defendant.) Friday
) June 28, 2013
) 10:01 a.m.

TRANSCRIPT OF PROCEEDINGS

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Reported by: BELLE BALL, CSR #8785, CRR, RDR
Official Reporter, U.S. District Court

(Appearances continued, next page)

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Official Reporter, U.S. District Court

1 **FRIDAY, JUNE 28, 2013**

10:01 A.M.

2 **P R O C E E D I N G S**

3 **THE CLERK:** Calling Case C-11-01726, Fraley, et al.
4 versus Facebook.

5 Counsel, please state your appearances.

6 **MR. ARNS:** Good morning, Your Honor. Robert Arns for
7 Plaintiffs.

8 **THE COURT:** Good morning.

9 **MR. RHODES:** Good morning, Your Honor. Mike Rhodes,
10 of Cooley, and my team here at the table (Indicating), on
11 behalf of Facebook.

12 **THE COURT:** Good morning.

13 **MR. WEINMANN:** Good morning, Your Honor. Steve
14 Weinmann for the Plaintiffs.

15 **MR. JAFFE:** Good morning, Your Honor. Jonathan
16 Jaffe, Jonathan Jaffe Law, for the Plaintiffs.

17 **THE COURT:** Good morning.

18 **MR. FOSS:** Good morning, Your Honor. Robert Foss for
19 the Plaintiffs.

20 **MR. OSBORNE:** Kevin Osborne for the Plaintiffs.

21 **THE COURT:** Good morning.

22 We're here on the hearing to determine whether or not
23 final approval is appropriate with respect to the proposed
24 settlement of this class action. This is how I would like to
25 proceed so we can have an orderly process.

1 First, I will invite the proponents of the settlement to
2 make a short presentation. I just was handed up a very
3 lengthy -- it appears to be a PowerPoint presentation. I don't
4 want that. I really want to just have a -- a back-and-forth,
5 as opposed to a lecture.

6 So what I would like to do is to have, as I say, the
7 Plaintiffs and counsel for Facebook go ahead and summarize for
8 me their points. I have read through the voluminous papers, so
9 we don't need to repeat all that. I'll have some questions for
10 all of you.

11 Then I will hear from the objectors who wish to make any
12 presentations that they wish to make. I'll then allow the
13 settlement proponents to respond. I request that the fees
14 issue we put at the end, and we can have a discussion about
15 that once we have gone through the basic particulars of the
16 proposed settlement.

17 So, with that, I'll go ahead and invite Plaintiffs to
18 begin the process.

19 **MR. ARNS:** Thank you very much, Your Honor.

20 First of all, the class has spoken, and we have had
21 614,944 claims filed. There's been 6,825 opt-outs. There's
22 104 objections, and as you know, Your Honor, most of those are
23 e-mail with one sentence.

24 There's eleven briefs. Of all the objections,
25 Your Honor, 60 percent -- 40 percent of them state that class

1 actions are bad, there shouldn't be class actions. So that --
2 really aren't objections.

3 That leaves approximately 60-point --

4 **THE COURT:** Well, they're more than class actions are
5 bad; they're questioning your case.

6 **MR. ARNS:** That's correct, Your Honor.

7 **THE COURT:** Right.

8 **MR. ARNS:** That's correct. And so what we have, in
9 essence, Your Honor, is .04 objections per million people in
10 this class. And we think that the class has overwhelmingly
11 endorsed this settlement.

12 Now, Your Honor, I would just like to take a few seconds.
13 We're prepared to go any way you want on this, and fully
14 understand this has been fully briefed.

15 One of the things that I would like to talk about is what
16 is Facebook. And we know that it's a social media site, that
17 it costs \$2 billion a year to run it at this time. It's free
18 to its members. And it's a marketing site, it's an advertising
19 site, as is Google and many other sites. That's what pays for
20 these online services.

21 **THE COURT:** Let me ask you some specific things with
22 respect to the proposed settlement that I want you to address
23 for me. Let's talk for a moment about your valuation of the
24 injunctive relief.

25 Now, that has relevance, and we can talk about it later

1 with respect to your request for fees. I'm not sure it is as
2 necessary to put a dollar figure on the injunctive relief for
3 purposes of assessing whether or not this is a fair, reasonable
4 and adequate settlement. So that is sort of the preamble to my
5 question.

6 I have some trouble understanding your various theories of
7 how you value the injunctive relief. You have got a fair
8 market valuation and another --

9 **MR. ARNS:** Option.

10 **THE COURT:** -- form of option that your experts are
11 opining on. My concern is, you seem to continue to conflate
12 benefit you assess to Facebook as damage to the class members,
13 and I think that's a logical leap that is not entirely clear to
14 me.

15 But beyond that, I just don't -- most of it seems very
16 highly speculative, and I don't -- I am having trouble with all
17 of the theories of your valuation.

18 **MR. ARNS:** Your Honor, let me respond to that. We
19 have the theories summarized on Slide 41. And it's all
20 briefed, and you know exactly what they are.

21 But, one of the most important parts of the injunctive
22 relief is that 99 percent of this class of 150 million class
23 members, members on Facebook, will get the benefit of this
24 injunctive relief now, and in the future.

25 There are many class actions, Your Honor, where the

1 injunctive relief only is provided if somebody buys another
2 product, if somebody does this --

3 **THE COURT:** My question is the valuation issue. I
4 understand that there is injunctive relief, and your position
5 is that it is of great benefit to the class. I'm not saying
6 that I have concluded it anything but that.

7 But I'm -- I don't see how you value it at between -- I
8 believe it's 54 and \$140 million dollars. I'm having trouble
9 seeing how you do that.

10 So you can assume for purposes of my question that I'm
11 not -- I'm not doubting there's some benefit to the class.
12 Although I note that one of the objectors, I think, yesterday
13 filed something that said -- I'll ask Mr. Rhodes about this --
14 that Facebook is not even going to do sponsored stories any
15 more.

16 But we'll get into that later --

17 **MR. ARNS:** Right -- we have that --

18 **THE COURT:** -- in terms of the value of the
19 injunctive relief that you place on it.

20 **MR. ARNS:** Yes. Your Honor, all my life, as a
21 plaintiffs' attorney since 1975, I have been asking juries to
22 put price on the priceless. And this is something, we know it
23 provides great value to the class.

24 How do you put a monetary value on that? You can look at
25 the different analyses. You can compare the common fund that

1 we are dealing with, \$20 million.

2 And, Your Honor, I want to thank you very much for your
3 direction that you did at our first preliminary approval
4 hearing, because we were -- we're in love with the injunctive
5 relief on the Plaintiff's side.

6 We think that it sets a new standard for all social media
7 sites in the United States. We believe that they know if they
8 don't -- if there is not full notice and full control on
9 advertising -- and this what -- this is the new form of
10 advertising that --

11 **THE COURT:** Well, let me stop you, Mr. Arns. I -- I
12 understand that. I think we are ships that are passing in the
13 night, on my question. Your responses to me are that this is a
14 real benefit. And let's assume I agree with you, that there's
15 benefit in the injunctive relief.

16 What I'm trying to get at is, you then put a price tag on
17 that. And the analysis, I'm having trouble following as to how
18 you quantify this with the numbers, which are rather large,
19 that you place on the value of this injunctive relief. And I'm
20 trying to, in fairness to you, understand how you get there.

21 **MR. ARNS:** Perhaps this, Your Honor, that we know
22 that the analytics of this case show that those that have been
23 included in sponsored stories, and that was -- when Judge Koh
24 issued her motion -- ruling on the motion to dismiss, she said
25 that the statutory damages of 3344 are not a vested right. You

1 must show that there was actual damage first.

2 We spent a lot of time, Your Honor, with respect to our
3 experts -- we had five experts, as you know -- before the
4 motion for class certification. The case settled approximately
5 two days before the motion for class certification. And the
6 whole thing, all of -- they were all marketing experts and
7 economists, with a couple of software folks. And the issue
8 was: What was the actual damage? And the actual damage was
9 approximately 94 cents per person. We had to prove that in
10 order to get to the 3344.

11 Now, at that time people did not have notice or control.
12 Now they have notice and control. And what I would say,
13 Your Honor, just citing the case, the Netflix privacy decision
14 that just came out, Judge Davila said (As read):

15 "The settlement amount -- which includes the size of
16 the cash distribution, the *cy pres* method of
17 distribution, and the injunctive relief -- to be a
18 factor that weighs in favor of approval."

19 And the case law, as you know, Your Honor, on the
20 valuation of injunctive relief is that just because it's
21 difficult to evaluate doesn't mean we shouldn't put a value on
22 it.

23 I have done a lot of banking cases, Your Honor, where we
24 know exactly what the late charges that were improper were, in
25 the past and in the future. That's very easy to work with.

1 Because this is a little more difficult, I would implore the
2 Court to try to put a value on it.

3 I believe the Court could say that although it is
4 difficult to put a value on this, it is of great value to the
5 class. And again, the class members every day who use Facebook
6 will get that benefit, and they have the notice and control.

7 And perhaps you could say, Your Honor, that the value is
8 at least that of the common fund that's paid here. We know --

9 **THE COURT:** Twenty million?

10 **MR. ARNS:** We could say that, Your Honor. We believe
11 it's a lot more.

12 **THE COURT:** I understand that, but I understand you
13 say that it's worth a lot more. And that's what I'm trying to
14 get at: How do you calculate that?

15 And I understand you have got this real option valuation
16 and fair market value, or minimum value. And as I read through
17 the presentation, as I said, I'm having trouble seeing where
18 this is not just, you know, a speculative theory as opposed to
19 something that I think really supports those numbers. That's
20 what I'm trying to give you an opportunity to explain to me.

21 **MR. ARNS:** This is difficult to evaluate. There's no
22 question about it, Your Honor. And we will fully admit that.
23 But again, the crown jewel of this settlement is the injunctive
24 relief. As I said at our first preliminary approval hearing,
25 that if there were no common fund at all, we still think this

1 is a great settlement, getting this injunctive relief. That's
2 what we worked hardest on, from the Plaintiffs' side, to
3 change.

4 **THE COURT:** When I didn't approve it the first time,
5 my view was contrary to yours.

6 **MR. ARNS:** That's correct. And we had a different
7 valuation method. And we know that the case law does address
8 that what it cost Facebook is not -- or what it costs the
9 Defendant is not the way to value the injunctive. We know
10 those cases, Your Honor. We took these different valuation
11 methods. We think the option value method is the best. But
12 looking at all of the methods, Your Honor, irrespective, we
13 know it has great value.

14 And again, I would implore the Court to say: This is
15 difficult to evaluate, but the Court knows that it has great
16 value to the members, and every member will benefit from this,
17 that's in the class.

18 Additionally, Your Honor, this provides the message, the
19 legal message, to every one of these online sites, as we have
20 discussed -- Facebook said this is the holy grail of
21 advertising now, having a friend endorsement. We don't care if
22 some celebrity endorses a product. We know that celebrity has
23 been paid a lot of money to endorse the product. But when a
24 friend endorsed the product, that has value.

25 Do friends become celebrities --

1 **THE COURT:** They have value to Facebook. The
2 question is, is there a damage to the class members. And one
3 does not automatically equal the other.

4 **MR. ARNS:** Just as Judge Koh mentioned, it is not a
5 vested right that we have to prove that damage. We spent a lot
6 of time proving damages in this case.

7 **THE COURT:** Okay. Let me shift to a different
8 subject.

9 And I will ask you about this as well, Mr. Rhodes, but I
10 want to give Mr. Arns the first chance to address it with me.

11 There is some discussion in the papers that perhaps an
12 additional, an adjustment upwards, because the way the numbers
13 are shaking out in your proposal, that those class members that
14 have made claims could go from \$10 up to \$15. And as I'm
15 seeing your papers, you are almost suggesting that that would
16 be appropriate.

17 The settlement papers themselves, when they went out, the
18 notice -- and my concern about that, and I'm not indicating
19 that in the event I approve it, I'm not going to go that path.
20 But what occurred to me was how clear is it, or was it, to
21 class members that that might occur. Because I think what you
22 have told me, over 6,000 people opted out -- is that correct?

23 **MR. ARNS:** That's correct, Your Honor.

24 **THE COURT:** And my concern, quite frankly, is would
25 they have opted out if they thought -- was it clear to them

1 that it might be \$15?

2 So, on the one hand, I'm not averse to the idea that some
3 enhancement of the amount is some path that would be
4 appropriate, but I'm just a little concerned on the fairness
5 notion, that when the settlement was presented, was it clear
6 that it might be more than \$10.

7 **MR. ARNS:** Yes, Your Honor. On Slide 35 -- and I
8 might point out to the law clerks, the slides are behind you,
9 if you want to grab those and look at them (Indicating).

10 **THE COURT:** Okay. Go ahead.

11 **MR. ARNS:** Now, Your Honor, Slide 35, we quote the
12 language on the bottom, which is from the long-form Notice of
13 Settlement, Page 6. It specifically says --

14 (Off-the-Record discussion between counsel)

15 **MR. ARNS:** Yes, Exhibit 2 to the amended settlement
16 agreement, Your Honor.

17 **THE COURT:** Okay.

18 **MR. ARNS:** (As read):

19 "If paying \$10 to each Authorized Claimant does not
20 exhaust the Net Settlement Fund, the remaining funds
21 will be distributed to the not-for-profit
22 organizations identified below, unless the Court
23 orders otherwise as discussed in Section 2.3(b) of
24 the Settlement Agreement."

25 You know, Your Honor, I'm not going to quote the whole

1 language. It basically says that you have the right to
2 increase the pro rata payment to each authorized claimant.

3 But the key language, going back to the long-form notice,
4 Page 6, after that first paragraph it says (As read):

5 *"Again, no one knows in advance how much, if*
6 *anything, Authorized Claimants may receive, and no*
7 *one will know until the deadline for submitting*
8 *claims passes."*

9 So that is in italics, and it makes it very clear. And,
10 by nature of notice, case law and notice, everyone in the class
11 has notice of that. So we believe, Your Honor, there is not a
12 notice problem at all.

13 **THE COURT:** Okay. Or, the related concept, any
14 unfairness to someone who has opted out. You think they were
15 on -- they were --

16 **MR. ARNS:** Correct.

17 **THE COURT:** They were on notice that it might be more
18 than \$10.

19 **MR. ARNS:** Yes.

20 **THE COURT:** Okay.

21 **MR. ARNS:** And we know, Your Honor, the monetary
22 benefit would go from 1.6 million, approximately, to 9 million,
23 224 million.

24 (Reporter interruption)

25 **MR. ARNS:** 9,224,000.

1 **THE COURT:** Okay. Let me shift -- and I realize I'm
2 bumping around. That's the reason, not -- and you can
3 certainly refer to what you have prepared. I didn't mean to
4 suggest it's not something that is useful. I just didn't want
5 you to launch into it in a lecture form because I have
6 questions rather than that.

7 **MR. ARNS:** Yes, Your Honor.

8 **THE COURT:** But you can certainly continue to refer
9 to it, and it is helpful.

10 **MR. ARNS:** I had a pretty good lecture prepared. I
11 would never lecture Your Honor, but --

12 **THE COURT:** I'm sure it was very good.

13 A completely different subject, but -- and in the grand
14 scheme of life, not an enormous amount of money, but a concern
15 that I want to address with you, and that's the incentive
16 payments for the class representatives.

17 I read through the *Radcliffe* decision again, and I agree
18 that this is not a *Radcliffe* situation, at least as I
19 understand it, because there isn't any tie, either in the
20 retainer agreements -- I want you to confirm this for me -- or
21 in the settlement documents, that essentially require the class
22 representatives to support the settlement. And that was the
23 particular concern in *Radcliffe*.

24 **MR. ARNS:** Right. That's correct.

25 **THE COURT:** Okay. But *Radcliffe* does -- I know

1 Mr. Rhodes's papers say *in dicta*, but the *Radcliffe* case does
2 talk about concern of the disparity between what class members
3 are receiving, and a big delta between that and an incentive
4 payment award. And in this instance, let's use the 15-dollar
5 figure for purposes of discussion, class members would be
6 receiving \$15, but you're proposing that the three class
7 representatives receive \$12,500.

8 **MR. ARNS:** That's correct, Your Honor.

9 **THE COURT:** That's an enormous difference when you
10 just look at the gap between the two. Doesn't the *Radcliffe*
11 decision suggest that that is a problem?

12 **MR. ARNS:** No, Your Honor. And let me explain why.

13 *Radcliffe* again, as you know, was that if you do not
14 support the settlement, then you are, in essence, opted out as
15 a class rep.

16 **THE COURT:** And actually, let me just stop you there
17 because I asked you to confirm it for me, neither the retainer
18 agreements nor the settlement documentation ties incentive
19 payments to support for the disposition.

20 **MR. ARNS:** Absolutely not, Your Honor, they do not.

21 **THE COURT:** Okay.

22 **MR. ARNS:** Now, let me just say this: I would like
23 to talk about discovery later, but in every deposition -- and
24 we have two minor class reps, and then we have Susan Mainzer,
25 who is an adult; J.D. has now reached the age of majority.

1 And again on Facebook, Your Honor, as you know, you have
2 to be a teenager. There are no children allowed --

3 **THE COURT:** Below 13.

4 **MR. ARNS:** -- on Facebook; 13 and above. So between
5 13 and 17, before the age of majority, are the only minors on
6 Facebook.

7 In every deposition, J.D., W.T., and Susan Mainzer -- and
8 for that matter, Angel Fraley, because her deposition went,
9 although she dropped out -- the question --

10 **THE COURT:** She is an objector, isn't she?

11 **MR. ARNS:** She is an objector in that she wants some
12 money. She supports the settlement -- as a matter of fact,
13 Your Honor, I think she deserves something. I mean, she gets
14 more phone calls and media requests than anybody, and she
15 dropped out because of privacy concerns.

16 And I would say this, Your Honor. We made a motion to
17 preclude her deposition. It was denied because she was a class
18 rep. And she had her deposition taken too. And I would ask
19 that we transmute 5 million -- excuse me -- \$5,000 of our fees
20 to her, if the Court would approve that, if we have case law to
21 support that, because of what she went through.

22 But what I want to point out, Your Honor, what the class
23 reps did, and this is one of the key parts of this case, and
24 that's the 3344 fee-shifting statement, 3344(a), the prevailing
25 party is entitled to costs and fees.

1 In every one of those depositions, including the minor
2 depositions, Facebook asked the question: "Do you understand
3 that you are responsible for all of the fees and costs that is
4 being generated in the defense of this case?"

5 And it was first asked: "Have your attorneys explained
6 that to you?"

7 I, of course, objected: "Objection, invades
8 attorney/client privilege."

9 But that was a fact of life. Every one of those
10 depositions went the full seven hours.

11 Now, query, Your Honor: Is it ethical for a lawyer to
12 hold a client harmless in this situation?

13 And this is a for-real situation, as you know, in *Friend*
14 *Finder*, your case, the Robyn Cohen case, Facebook came in and
15 asked for over \$700,000 in fees. And the response at that
16 time, I believe, was that the Court never got jurisdiction,
17 motion to dismiss was granted.

18 **THE COURT:** That was my conclusion, right.

19 **MR. ARNS:** Yes. And we got by the motion to dismiss.
20 This was very real. And this is something -- if I can just
21 save a little time by talking about this, as far as the
22 objectors are concerned also.

23 **THE COURT:** Okay.

24 **MR. ARNS:** The objectors never have any skin in the
25 game. They -- I believe the Court should rule, if they fail on

1 their appeals -- should be subject to 3344 fee shifting and
2 have to pay the fees that were generated.

3 Now, we have the case law on that, Your Honor. We know
4 the --

5 **THE COURT:** I'm not sure -- even if that was
6 something I was inclined to entertain, I'm not sure that would
7 be part of the approval process.

8 **MR. ARNS:** It is not, Your Honor. And we believe,
9 although the First Circuit in the *Skolnick* (Phonetic) case
10 recommends that, we believe the Ninth Circuit, in the *Azizian*
11 (Phonetic) case, states that the District Court should not do
12 that, it should be the Appellate Court that does that, but
13 recommendations could be made.

14 Now, this -- not only the *Robyn Cohen* case, the *D. Cohen*
15 case where the demurrer was granted with leave to amend --

16 **THE COURT:** So, down in L.A. Superior?

17 **MR. ARNS:** That's correct. And that is one of the
18 precursor cases of CMD That team is on CMD

19 **THE COURT:** Right.

20 **MR. ARNS:** They dismissed that case. They didn't
21 want to take it up on appeal. And that was dismissed -- or
22 excuse me, the demurrer was granted with leave to amend based
23 on COPPA, the Children's Online Privacy Protection Act.

24 And Her Honor ruled in that case that -- that the demurrer
25 was granted with leave to amend because COPPA only dealt with

1 12 and under, they protected minors 12 and under. The minors
2 on Facebook, as we have discussed, are 13 to 17; thus, case
3 thrown out.

4 Now, that case did not involve sponsored stories. It
5 involved Facebook ads with social content. So in that case
6 over \$800,000 were requested in fees by Facebook.

7 And by the way, we found out what Mr. Rhodes' hourly
8 billing was on that issue, Your Honor, and this goes in the fee
9 motion, it was \$930 an hour, if I could just say this for a
10 second?

11 **MR. RHODES:** It's an absolute bargain, Your Honor.

12 **MR. ARNS:** Can I say this, Your Honor? I would wager
13 that those -- those hourlies were ratcheted down for purposes
14 of the Court. I believe Mr. Rhodes is worth more than that,
15 and I bet he charges more than that.

16 But at any rate, our class reps --

17 **THE COURT:** Of course, you all have hourly fees way
18 in excess of mine, so -- but go ahead.

19 **MR. ARNS:** Your Honor --

20 **MR. RHODES:** We are not going to establish or quarrel
21 with the value proposition represented by our hourly rates,
22 Your Honor.

23 **THE COURT:** That is all right.

24 Go ahead.

25 **MR. ARNS:** As I said, Your Honor, the A-students

1 become the judges. So --

2 **THE COURT:** Okay.

3 **MR. ARNS:** At any rate, so this was a tremendous
4 concern of these class reps and, if you have 150 million
5 members in a class, and the class reps are supposed to have an
6 equation similar to that, in our wage-and-hour cases.
7 Your Honor, in our wage-and-hour cases where we get \$200,000,
8 \$150,000 per member of the class, and the class is made up of
9 500 people, that applies, that 100 percent applies. That is a
10 frivolous objection, as are all of them.

11 And I think there is one objection -- I'm sorry for --
12 maybe we can cover this. There's one objection that
13 potentially had some validity. And that is, if Facebook is
14 going to change the name of sponsored stories, and then go out
15 and do this under a different name -- and I can tell Your Honor
16 that I spent a lot of time crafting the definition of
17 "sponsored stories," additionally in our settlement. So even
18 if they change the name it doesn't matter. And I don't -- so
19 we have that covered.

20 Additionally, Your Honor, you have the right to do an
21 audit, and we would request that.

22 Additionally, Your Honor, one of our continuing
23 responsibilities is to monitor Facebook. And Mr. Rhodes --
24 Mr. Rhodes and I had a meeting based on that. And we don't
25 talk a lot, but we did have a meeting on that. And the meeting

1 had to do with what is happening here.

2 And Mr. Rhodes, who, as counsel of Facebook, can explain
3 it further because he has spoken with Facebook on that -- maybe
4 you want him to address that right now, because he has the
5 press release that that objection was based on.

6 But irrespective, Your Honor, I can go right to our
7 release provision that addresses that. And it --

8 **THE COURT:** We'll get there in a moment. And now you
9 have covered for me -- remember, we started with the incentive
10 payment issue in terms of my question.

11 **MR. ARNS:** Yes.

12 **THE COURT:** And I understand why you, why you have
13 gone where you have gone. But let me ask you a couple more
14 things, and then I'll ask Mr. Rhodes to address some issues.

15 I do -- and this actually takes us to the objectors'
16 points, so perhaps I ought to wait on this. But I do want to
17 cover with you at some point the minor subclass issues because
18 those tend to be, I think, the -- the bulk, if you will, of the
19 objections, and I want to go over that with you.

20 Actually, why don't you go ahead and address that --

21 **MR. ARNS:** Sure.

22 **THE COURT:** -- in summary fashion because I know we
23 are going to hear more about it. But, go ahead.

24 **MR. ARNS:** Yes, Your Honor. We like to call it the
25 teenager subclass. Because we know, Your Honor, that first of

1 all, the teen subclass claims are not stronger than the
2 subclass claims. Judge Murphy, when he transferred CMD here,
3 stated the SRRs apply; the SRRs, the California venue
4 provision, California law provision.

5 And, in essence, we have a situation, Your Honor, where,
6 the teenagers continue to use Facebook. We have the implied
7 consent situation as well as the actual consent. And --

8 **THE COURT:** "A situation" meaning defenses.

9 **MR. ARNS:** Yes. Well, not only defense, but that's
10 what's happening, the teenagers don't want to leave Facebook.
11 They say: "Oh, my God, I'm going to sponsor a story, I'm never
12 going to use Facebook again."

13 They continue to use it, continue to commit the social
14 actions which create the sponsored stories. Now, every one of
15 those sponsored stories, they are going to see every one
16 they're in.

17 When we talk about the injunctive relief, actually, again,
18 Mr. Rhodes, when we were talking about the objection pertaining
19 to the -- the pseudonym of sponsored stories, which was going
20 to create a problem, I asked him to present the slides on the
21 injunctive because he deals with Facebook and they have how the
22 injunctive is going to change the mockups on that.

23 I have everything in my presentation also, Your Honor, but
24 I believe a --

25 **THE COURT:** The actual mockups for -- yeah, I did --

1 **MR. ARNS:** Mr. Rhodes has those.

2 **THE COURT:** Right.

3 **MR. ARNS:** And he gave me some of those, but he's
4 better equipped because -- to talk about that.

5 Now, one-third of the teens on Facebook already have --
6 are linked up to their parents already. And I'm not going to
7 talk about the injunctive necessarily too much right now, but I
8 would like Mr. Rhodes to follow up on the teenage issue, with
9 the parents' ability, whether they're on Facebook or not, to
10 opt out the teens. The fact that they check a box, whether or
11 not they have a parent on Facebook. If they don't, they're
12 out, they're opted out. This teen subclass faces the exact
13 same risk.

14 And again, Judge Murphy's decision from the Southern
15 District of Illinois is very important on this analysis. We
16 get into family law, we don't think that family law issue at
17 all applies. And if you look at the Family Code --

18 **THE COURT:** This is Judge Murphy's decision in CMD.?

19 **MR. ARNS:** Yes, yes.

20 And he didn't address the family law issue, but with
21 respect to that issue, this is not a delegation of power by
22 using Facebook. This is not in any way covered by the family
23 law.

24 If -- if we had a situation that blew out those -- the
25 statements of rights and responsibilities, the terms of use, so

1 to speak, if -- if that occurred, then minors would not be
2 allowed to use Facebook because they aren't complying, and they
3 have to comply with SRRs.

4 Now, the minors want to keep using it. The teen subclass
5 is eligible for the monetary award also. The teen subclass, by
6 the way, got actual notice of the sponsored stories through the
7 notice -- the notices in this settlement.

8 You know, Your Honor, one of our minors basically bought a
9 sponsored story on Facebook, one of our class members, because
10 he had a -- one of the ways he made money is doing sound
11 systems for bands.

12 And the point is, this group, 13 to 17, extremely
13 intelligent group. Yes, there is going to be some immature
14 minors that are going to do stupid things on Facebook. That's
15 not the issue in this case. There's a lot of immature adults
16 who do stupid things on Facebook. That is not the subject of
17 this case.

18 So the relief also, all the injunctive relief for the
19 minor class is exactly for -- like that of the adult class, and
20 it's better. There's no enhanced remedies of law available to
21 the minor subclass. And all current minors -- again, you look
22 at the COPPAPPA demurrer that was granted in *D. Cohen*, look at
23 that.

24 Now, one of the comments that was made by Mr. Fellmeth was
25 that, "I don't represent minors."

1 And, Your Honor, in 38 years of being a plaintiffs' lawyer
2 in San Francisco, I have represented thousands of minors. And
3 I am proud of that fact, and we know that is something, as far
4 as experience. The minors represent about 13 percent of the
5 class.

6 Now, with respect -- so at any rate, Your Honor, Judge
7 Murphy's ruling on CMD -- and again, as the plaintiffs' counsel
8 in CMD said, "If you say that the SRRs apply, that is ruinous
9 to our case," because they want to get them out of the SRRs.

10 But do the minor subclass, do they want to keep using
11 Facebook? Let's ask that question. Any one of them can stop
12 using Facebook now. You can't -- high school coaches, junior
13 high coaches, put when practices take place on Facebook.
14 Assignments, the teachers now put on Facebook. They don't use
15 e-mail any more. And it is part of the culture, for better or
16 for worse.

17 And actually, I would like to say this: Having spent time
18 with the inner circle at Facebook, not in what I would call an
19 affable way, I tip my hat to the American ingenuity that has
20 created Facebook. It is an amazing product.

21 I remember when my son said, "Dad, do you want to see my
22 Facebook page?"

23 I have all the inside information on him. I said,
24 "Absolutely not. I don't."

25 And then he showed it to me. And he showed me his

1 preschool friends, his junior-high friends, his grade-school
2 friends, his college friends. He -- and it's amazing that the
3 connections that -- all the good -- there is a tremendous
4 amount of good on Facebook.

5 And I want to say from a marketing standpoint, also, I
6 believe in free enterprise. And marketing creates sales which
7 creates jobs. Silicon Valley and what happens there is an
8 amazing driver of our economy.

9 Now, CMD counsel basically had a press conference before
10 the IPO, of Facebook, and said: Tens of billions of dollars
11 are at stake.

12 I don't do press conferences that are blackmail to a
13 company. Let's find out what happens in the case, let His
14 Honor make the decisions, then we may have a press conference.

15 **THE COURT:** Okay. Let me ask Mr. Rhodes to weigh in
16 on whatever -- in whatever order. Or if there are other issues
17 you want to start with, go ahead.

18 **MR. RHODES:** I think I can self-direct through the
19 Court's questions. I would like -- I do have a PowerPoint
20 presentation, not to go through but because it contains a lot
21 of detail for you.

22 I would like to hand you and direct your attention to
23 Page 5 of that, if I may.

24 (Document handed up to the Court)

25 **THE COURT:** Okay.

1 **MR. RHODES:** For the Court's benefit, the prior
2 slides are basically just metrical data that you may be
3 interested in, timelines of what happened when, the deadlines
4 that are intrinsic to your approval order.

5 So your first question to counsel was: How do you value
6 the injunctive relief?

7 And my response to you is: You don't need to.

8 And you recall that we discussed this last fall when we
9 came before you on a preliminary approval order, and I want to
10 recast the economic framework because I agree with Mr. Arns,
11 that in the abstract there is intrinsic and perhaps very
12 substantial value.

13 I'm not going to weigh in to whether the methodologies and
14 the models that you have been given in the record give you a
15 concrete basis to make that determination for determining how
16 to calibrate the strengths and weaknesses of the case versus
17 what's been circled up in terms of consideration.

18 **THE COURT:** My understanding of your position, just,
19 if I can summarize it, and you can tell me if this is wrong, is
20 that just looking at the terms of the settlement as it
21 currently sits, the 20 million actual cash, and then a finding,
22 if you will, that there is value in the injunctive relief, that
23 that is a sufficient overall value to warrant approval of the
24 settlement.

25 **MR. RHODES:** That's correct, Your Honor. And without

1 belaboring the math on the page I gave you, remember, the
2 starting point has to be what did the Plaintiffs seek by way of
3 damages in the case. The objectors make a lot to do about the
4 statutory damages bogey, but *Lane* clearly says you don't go
5 through that analysis at all. You don't look at the statutory
6 damages metrics because it would be impossible to assess them.

7 And in the context of this case --

8 **THE COURT:** Let me stop you there.

9 You don't because it is not a given that every class
10 member would be able to recover the statutory damages.

11 **MR. RHODES:** You took the words out of my mouth. We
12 can look at Judge Koh's decision. I think it is Page 27. You
13 have seen a quote from it already.

14 What's interesting about her quote is not the language
15 that Counsel just gave you, it's the sentence right after that.
16 She refers to the word "Proveable."

17 She says: Not only -- you don't just come in and wave
18 your hands and say, "statutory damages," you have to show
19 actual injury and actual damages, and they have to be proveable
20 at trial.

21 And that's where the case starts to fall apart. So if you
22 assume that *Lane* is correctly decided, which is the current
23 Ninth Circuit articulation, and you take her at her word, the
24 math that's on that page is where you leave off.

25 And remember, just as a very quick reminder, the

1 Plaintiffs proffered two theories of economic harm. Theory 1
2 was that, of the net profits associated with sponsored stories,
3 remember, gross was about -- I grossed it up through the date
4 of your preliminary approval order, by the way. So it's about
5 260. Fifty percent operating margin takes you to 130. They
6 said two models. One is 75 percent of the net income, or
7 50 percent.

8 So we just pushed them together and said, "Okay, your
9 average is 62.5 percent, that is your theory. We disagree with
10 it, but that's your theory."

11 And so the starting point is a net damage figure in the
12 75 to 90 million-dollar range. And that is before you do any
13 litigation risk assessment of all the problems they were going
14 to face, which I won't burden you with now, but if you go
15 through the following slides you will see all the deductions.

16 So if you just compare that number with the consideration
17 in cash, you are in the 20 percent range of total consideration
18 to the damage model without adjustment. And that's well within
19 the bandwidth of acceptability in the Ninth Circuit.

20 And that is really the point I'm making, which is, I'm not
21 suggesting that the Court should or shouldn't put a value on
22 the injunctive relief; I'm suggesting you don't need to do it
23 in order to find that the settlement meets the test of being
24 fair, reasonable, and adequate. So that is my response on
25 Point No. 1.

1 On Point No. 2, you asked about whether class members were
2 aware that they could go up to \$15. You expressed some
3 concern. We see some resonance of that within the objecting
4 community. How would people know? What would have happened?

5 We specifically contemplated that eventuality in the
6 notice regime. But, let me give you a couple of record cites
7 for that. If you go to the Keough declaration -- she is the
8 class action administrator, Your Honor, and this is Docket
9 No. 341 -- and you look at Exhibit C, which is the long-form
10 notice, you can see for yourself exactly how it looks. This is
11 actually what went out to people.

12 **THE COURT:** Right.

13 **MR. RHODES:** And it tells them three things which are
14 important: One, you may not even get to \$10. Because,
15 remember, there was this provision that said we didn't know how
16 many people would submit claims, and if it went over what we
17 thought would be the target range, it may reduce it down to as
18 low as \$5, at which point maybe we do all *cy pres*. We ended up
19 with valid claims.

20 And this is on Page 2 or 3 of the presentation I gave you.
21 I actually give you the actual breakout of how it all works
22 out. Notice, e-mail numbers, claim numbers. If you want to
23 see it in person.

24 You end up with 780,000 claims, of which about 170,000
25 were bogus. One guy was particularly industrious, he submitted

1 160,000 bad claims, somebody named Antoine. But this is
2 Slide 4, Your Honor.

3 **THE COURT:** Okay.

4 **MR. RHODES:** Those people made claims, they
5 understood that they could get \$10, less than \$10, or more than
6 \$10, but we couldn't tell them in advance what they would end
7 up with. So we think it was in the notice, Page 6, Exhibit 2,
8 of the amended settlement agreement.

9 The third issue you raised has to do with the incentive
10 awards. And I'm going to take this as an opportunity to
11 comment on that because in the settlement agreement I said I
12 wouldn't affirmatively comment on it, but the Court has raised
13 it.

14 Let's take a look at the *Radcliffe* case again -- excuse
15 me, let's take a look at the incentive awards again. In the
16 *Experian* case, they were relying on those *Rodriguez* cases, and
17 those are the cases that stood for the proposition that, in the
18 retainer agreement itself, or in the engagement agreement
19 itself, there was an actual clause that made it conditional
20 that the named representative plaintiff would support the
21 settlement in exchange for an incentive award. That was sort
22 of a *de jure* finding of inadequate representation and made the
23 settlement suspect.

24 **THE COURT:** Right. Indeed, it was the basis on which
25 the settlement was --

1 **MR. RHODES:** Invalidated.

2 **THE COURT:** -- said should be invalidated.

3 **MR. RHODES:** Exactly. And so, *Experian* and *Radcliffe*
4 picks up that thread.

5 Now, the facts in *Experian* are -- and the Court actually
6 noticed this -- the Court says explicitly that incentive awards
7 are absolutely commonplace. And, indeed, we see them all the
8 time.

9 But what the Court notes is that we rarely see one like
10 this where the approval or support for the approval of the
11 settlement is made conditional on the receipt of an incentive
12 award.

13 And I did suggest in *dicta* -- that it is *dicta* about the
14 size of the award. I mean, you have to have some record,
15 obviously, upon which the Court makes its decision. I'm not
16 quarreling with that.

17 But if you look at what the case actually says, they hold
18 that, quote (As read):

19 "The conditional incentive awards themselves are
20 sufficient to invalidate the settlement."

21 And then they just go on to express some opinions about
22 the relationship between the level of activity investment by
23 the named representative plaintiffs and the award they get.

24 The game-changer here is the one that Mr. Arns
25 represented, which is that these Plaintiffs, unlike a lot of

1 other cases, because of the unique nature of the statute under
2 which their claims were being made, they faced a fee risk.

3 **THE COURT:** But you do agree that 3344 does change
4 the dynamic for purposes of assessing the incentive --

5 **MR. RHODES:** Yes. Because --

6 **THE COURT:** -- because the risk is different for
7 class reps in that circumstance.

8 **MR. RHODES:** And, it's not mythical in this case.
9 Because last fall, you and I were arguing about whether you
10 were going to give me \$700,000 against similarly situated
11 people. So, you've seen that we have made that motion before.

12 We believe that in the appropriate case, we would be
13 entitled to those fees if we prevailed, and that that is an
14 intrinsic risk that these people face. And I think that is a
15 variable that does change the calculation.

16 Your last question, explicit question, was on the minor
17 subclass. And a lot of the objectors are making the point,
18 pushing the argument that they should be carved out or
19 separated. So, let me give you a couple of things to think
20 about.

21 First of all, the claims were identical for the minors as
22 for the parents. They were made under 3344. The complaint was
23 exactly the same: "I pushed the 'like' button, a story ran in
24 some feed, and then a third party could pay Facebook a fee to
25 boost that same story."

1 That was a sponsored story. The claims were identical, no
2 difference at all.

3 Two: Two of the three named representative Plaintiffs
4 currently in the case were minors.

5 Now, interestingly, Mr. Duvall has transitioned from a
6 minor to an adult because the case has been around at the time
7 where he straddled the ages of 17 to 18. But you actually had
8 a majority of the named representative Plaintiffs were minors.

9 Three: COPPA preempts the landscape of state law. I
10 really don't think this is a debatable proposition, although
11 the objectors want to go there.

12 **THE COURT:** This is the L.A. Superior decision you
13 were going to direct me to?

14 **MR. RHODES:** Yeah. Judge Weintraub. But more
15 fundamentally, just the structure of the statute.

16 At one point in the drafting, they expressly contemplated
17 the sub-13-year-old verifiable consent of a parent regime
18 (Indicating quotation marks) for teenagers. They got a lot of
19 objections about First Amendment and other rights. They took
20 it out, and then they expressly said: Anything to the contrary
21 is preempted.

22 So there is a unitary interest across the minor class
23 relative to the state lawsuits that these objectors are going
24 to champion.

25 Next, and I can't give you a precise number, but I asked

1 Ms. Keough: Can you tell me whether or not the people seeking
2 cash out of the pot, any of them were minors?

3 I don't know the number, but it is more than 10,000, it is
4 many thousands of claimants were minors. So the process is
5 working the same for minors as it is for parents.

6 Next, they -- the objectors, I should say, cite that *Fife*
7 case, F-I-F-E. Judge Wilken. Right? Are you familiar with
8 this case?

9 **THE COURT:** Right.

10 **MR. RHODES:** And what's very interesting about that
11 case, Your Honor, and this is Case No. 12-1894, Document 44, in
12 the docket, Page 17. She expressly distinguishes Judge
13 Murphy's opinion on a very simple factual ground.

14 What she notes there is that -- in Judge Murphy's case,
15 the case that was transferred and is now before you and is
16 currently stayed, she says, in that case there was nothing in
17 the record to suggest that the minors weren't going keep using
18 Facebook. They don't get to come in and disaffirm a contract
19 while continuing to reap the benefits of the service that
20 Facebook provides. So, she says that decision is correctly
21 decided.

22 And then again on Page 17, Lines 15 through 17, she says
23 but my case is different.

24 And remember, this is just a motion-to-dismiss case. This
25 is a pleading case.

1 **THE COURT:** Correct.

2 **MR. RHODES:** She says, "Based on the allegations I'm
3 given, I'm told that the minors want to disaffirm the entire
4 contract." And so she says that's a meaningful distinction
5 about whether or not there's a distinction between the consent.

6 The reason I mention that, the objectors are trying to use
7 the *Fife* decision to as a way to say that the minors can't
8 consent at all to the SRRs. And even Judge Wilken's opinion
9 says no, that's not true; it has to do with what the intent may
10 be.

11 We don't think you get to those analyses for the reasons
12 you have seen in our papers, with COPPA and whatnot. But I
13 want to point out to you that the objectors, like much of their
14 argument, it is not tethered to the record. And they misstate
15 the facts, and they misstate the law, repeatedly.

16 Next, both minors and parents are governed by the same
17 SRR, governed the same body of law, California. So in terms of
18 trying to identify whether there are meaningful and substantial
19 dissimilarity between the interests of the minors and the
20 interests of the parents, in this case, on this record
21 (Indicating), there isn't.

22 And so these are fictional arguments raised by Mr. Zigler
23 and his -- his like, in order to preserve some ability to sue
24 Facebook for something. That's what this is really about. But
25 there was complete symmetry of interest across the board.

1 **THE COURT:** The -- again, this sort of is one that I
2 assume we will deal with, with some of the objections, but
3 what -- recently, what was submitted to me yesterday, which was
4 the suggestion that Facebook was going to go in a different
5 path, Mr. Arns has already made some reference to that. But,
6 do you want to comment on that now?

7 **MR. RHODES:** Yes, Your Honor. May I hand you two
8 documents? And, just for the Record, one is Exhibit 8 to the
9 amended settlement agreement. The other one is a printout from
10 the official Facebook blog (Indicating) on this issue that they
11 have raised.

12 (Document handed up to the Court)

13 **THE COURT:** Go ahead.

14 **MR. RHODES:** So, if you go to the papers to which you
15 were alluding -- these were submitted by the Schachter
16 objectors, let's refer to them as -- they assert falsely that
17 the injunctive relief that we are proposing here is fictional
18 because Facebook is going to pull the rug out from underneath
19 the Court and no longer do sponsored stories.

20 So if you look at the docket that you are currently
21 holding --

22 **THE COURT:** Just relabel it in some fashion.

23 **MR. RHODES:** Right. And this was something that was
24 expressly contemplated during the negotiations here.

25 And as you recall, you and I have crossed this bridge

1 before. I think it was 2009. Because you raised the question
2 from the bench at that hearing about *Bekin* (Phonetic), about
3 how do you define a function?

4 And we gave some thought to this. And if you look at the
5 amended settlement agreement, and you look at the definition,
6 it basically has three specific parts to the definition of what
7 a sponsored story is.

8 So if you look at the definition it says, first, it's
9 anything that Facebook calls a sponsored story. Without
10 limiting the generality of that, it also includes and then
11 lists a whole series of examples.

12 Third, it says, without limiting the generality of that,
13 why don't we prepare a lengthy chart (Indicating) of examples
14 of the ad products that would meet this definition.

15 And all three of those definitions together comprise the
16 definition for purposes of what you are being asked to order as
17 an injunction that pertain to sponsored stories.

18 And what I would ask you to do is take a look at the
19 Facebook blog posting and Exhibit 8, and compare the two. And
20 you'll see that it's very clear that Facebook isn't saying
21 sponsored stories are gone. They're saying the name of that ad
22 format is being phased out and, as the author of the blog post
23 says, sponsored stories will be part of the ad formats going
24 forward.

25 It's too cute by half to suggest that I can just stop

1 doing sponsored stories under one name and avoid the injunctive
2 relief.

3 But, again, let me give you a concrete example of this, in
4 practice. So if you take a look at the bound material I gave
5 you, there is an example in here, if you go back, and I'll find
6 the page number for you in a second.

7 Take a look at Page 25. Now, what we try to do in these
8 series of pages -- and again, I'm not going to go through these
9 today, I just gave this as a reference guide for you, for
10 purposes of crafting your opinion. If you look at the
11 right-hand column on Page 25, and you see the highlighted
12 language in yellow, that is what's new. What is on the left is
13 what's old. So this is an example of one part of the
14 injunctive relief package that is being proposed.

15 And you will see that under the revised terms, Your Honor,
16 there is a reference in that first revision to sponsored
17 stories. You see that?

18 **THE COURT:** Yes.

19 **MR. RHODES:** And the modifier is "such as," which
20 means "for example."

21 But then look at the body below that, where it says "You
22 give us permission", and if you read the totality of that
23 language, including the new language that starts, "This means,
24 for example....," there's no reference to any particular ad
25 format in that language. We understood that.

1 The point of this case was the Plaintiffs were saying, "We
2 don't think you described the process well enough by which you
3 might get paid for boosting one of these stories."

4 And so we defined it in a very holistic, very broad way.
5 And we gave you concrete examples, textually, graphically, and
6 in a more title way. And the totality of that tells you that
7 this, you know, eleventh-hour argument (Indicating) is just,
8 sort of, made of whole cloth.

9 More fundamentally, if you go look at the Schachter
10 exhibits themselves, and read them, it says things like,
11 "Include the best of sponsored stories for all." The exhibits,
12 themselves, that they attach don't support the proposition they
13 are advancing.

14 The *L.A. Times* article, Exhibit 1, it says, quote
15 (As read):

16 "One of the ad formats that Facebook is ditching is
17 sponsored stories."

18 But then look what it says. This is Page 1 of 2 of
19 Exhibit 1, Your Honor.

20 **THE COURT:** Right.

21 **MR. RHODES:** "It is folding it into other types of
22 advertising," consistent with the blog post.

23 Exhibit 2 to the Schachter objection -- this is the
24 article from *Advertising Age* -- on Page 2, Mr. Boland
25 (Phonetic) states (As read):

1 "Sponsored stories as an idea doesn't go away.

2 Sponsored stories as a product goes away."

3 They're just doing away with the name of that format.

4 They're trying to simplify their advertising formats. So,

5 there's nothing in the record to support this objection.

6 And even if there were, I would submit to you that we
7 built in a safeguard, which is, if you think about the
8 tripartite consideration that is at issue here, which is the
9 bucket of economic relief, the *cy pres*, and the injunctive
10 relief -- the *cy pres* and the injunctive relief, part of the
11 implicit message there is that: We are funding and empowering
12 a community of watchdog and advocacy groups to keep an eye on
13 us, and there's a built-in audit right, so if anybody thinks
14 that we are not complying with the Court's injunction because
15 we're playing games (Indicating quotation marks) with the
16 definition of "sponsored stories," you can order me to account
17 for it. And you also have that inherent power through the
18 discretion of the Court.

19 And then, Your Honor, let me give you one last document,
20 as an aid to the Record.

21 There were 104 objections of one kind or another lodged.
22 We said there were 17 valid, and 87 invalid. But we responded
23 to every one of them, regardless of how we characterized it.

24 So what I've done is, I've created an index for you, of
25 every single objection. Summarized the basis of it, and cited

1 to the Record where there is a response to that objection.

2 I'd like to give that to you, if I can.

3 **THE COURT:** Okay.

4 (Document handed up to the Court)

5 **MR. FRANK:** Could the objectors get a copy of that?

6 **THE COURT:** Pardon?

7 **MR. FRANK:** Can the objectors get a copy of that?

8 **THE COURT:** I don't know how many copies he has here.

9 **MR. ARNS:** The objectors have the briefs, Your Honor.

10 They know where every response is.

11 **THE COURT:** All this is, is just an index of
12 summarizing where to find things. It's not making an
13 additional argument.

14 **MR. RHODES:** I'll happily answer any specific
15 questions, Your Honor. I've tried to give you some materials
16 that summarize, obviously, a very voluminous record. I don't
17 want to repeat what we have said in our materials.

18 **THE COURT:** Okay. I appreciate that, and I think
19 what I will do at this point is look to the objectors, to go
20 ahead and give them an opportunity to elaborate on their
21 objections, although not an open-ended opportunity. I want to
22 move it along, because we do have several people that have
23 indicated a desire to address the Court.

24 So, let me start with Mr. Fellmeth. Have I pronounced
25 that correctly?

1 **MR. MICHELMAN:** Actually, Judge, would -- if you will
2 permit me, Scott Michelman, Public Citizen, on behalf of the
3 Schachter objectors. I've coordinated with my fellow
4 objectors, including Mr. Fellmeth, Mr. Frank, Mr. Zigler, and
5 Mister -- Mr. Sherwood, all of whom are here today, and we have
6 agreed upon an order and a division of labor which we hope will
7 minimize repetition and streamline the presentation of the
8 arguments.

9 Would you have --

10 **THE COURT:** I always encourage that.

11 **MR. MICHELMAN:** -- or would --

12 **THE COURT:** That's fine, if you are representing to
13 me that that is exactly what this is going to do. I don't want
14 repetition, and so I appreciate your comment.

15 Are you suggesting that you will now be presenting the
16 argument, but am I -- do all the people who have listed
17 themselves as wanting to speak, all still want to speak?

18 **MR. MICHELMAN:** My understanding, Your Honor, is that
19 myself, Mr. Fellmeth, Mr. Sherwood, Mr. Zigler, and Mr. Frank
20 are the five objecting counsel who are here today to speak.

21 I would first propose to outline to you what we plan to
22 cover, and then cover my piece, and then turn it over to the
23 other objecting counsel to cover their pieces.

24 **THE COURT:** Well, okay. Go ahead.

25 **MR. MICHELMAN:** Thank you, Your Honor. Once again,

1 Scott Michelman, Public Citizen, on behalf of the Schachter
2 objectors.

3 Your Honor, this is the order in which objecting counsel
4 proposes to proceed today. I'll be addressing, on behalf of
5 the Schachter objectors, the issues of minors and the
6 misappropriation statutes, including California Civil
7 Code 3344, and the possibility that it's preempted by COPPA.

8 I'll then be addressing the argument we made this week
9 about the redefinition or abandonment of the sponsored stories
10 program.

11 Then a fellow objector, Robert Fellmeth, of the Children's
12 Advocacy Institute, will be addressing provisions of the
13 California Family Code, and broader concerns about minors'
14 rights.

15 Mr. Sherwood, Alan Sherwood, will be addressing notice
16 deficiencies and fees.

17 Mr. Frank, of the Center for Class Action Fairness, will
18 be addressing structural problems, including class definition
19 and the claim rate.

20 And finally, Aaron Zigler of Korein Tillery will be
21 addressing the over-breadth of the release.

22 **THE COURT:** Okay. The individual who wants to speak
23 about the fees, I would put that person after we conclude the
24 other objections, because as I indicated before, I put that at
25 the end of the discussion. So, I'll give that person an

1 opportunity to make whatever comments they want to make, but I
2 want to hold that off from the initial part.

3 And also, just for timing purposes, I did block the
4 morning out, but that -- the morning, in my mind, and we are
5 probably going to take a break at some point so that the court
6 reporter can rest her hands, the outside of this is 12:30,
7 because I have to move on to other things. But, just keep that
8 in mind.

9 So, go ahead.

10 **MR. MICHELMAN:** Understood, Your Honor. I'll try to
11 be very direct.

12 So beginning with the issue of minors and
13 misappropriation, the parties actually do not dispute that
14 California Civil Code 3344, and the laws of six other states
15 referenced in our brief, including the laws of Virginia,
16 Wisconsin, Tennessee, Oklahoma, New York, and Florida, prohibit
17 the use of a minor's likeness for advertising without parental
18 consent. They don't dispute that. And they don't dispute that
19 this proposed settlement does not solve that problem. There
20 are proposed safeguards which will help in some cases.

21 Mr. Arns said today that one-third of minors are linked to
22 their parents on Facebook. I would say, what about the other
23 two-thirds? Because --

24 **THE COURT:** How do you police that? What is your
25 proposal as to -- your premise is that minors -- and in this

1 instance we are talking about 13 to 17 -- without parental
2 consent should simply be precluded from participation?

3 **MR. MICHELMAN:** Either precluded or --

4 **THE COURT:** How do you do that?

5 **MR. MICHELMAN:** Well, I think -- I mean, I'm -- I
6 don't have the technological capacity, but I imagine that
7 Facebook does. In fact, in this very settlement, Facebook has
8 said if minors indicate affirmatively, take the step to
9 indicate their parents are not on Facebook, they -- Facebook
10 will stop using their images.

11 I would propose a better settlement would say unless the
12 minor is connected to a parent, and the parent affirmatively
13 consents, then Facebook does not use the minor's likeness. And
14 that's in order to comply with the laws of --

15 **THE COURT:** Aren't we in a universe where, whatever
16 you craft, at the end of the day you're -- to use the honor
17 system is not a precise way to describe what I'm getting at,
18 but you're always going to be dependent on the input you are
19 receiving from the user. I mean, there's no way to know the
20 age of the person on the other end of the electronic
21 communication.

22 **MR. MICHELMAN:** That is true, Your Honor. But
23 contrast what will happen in the bulk of cases, where minors
24 will simply, quote-unquote, represent -- and that is the
25 language of the settlement agreement -- that their parents

1 consent? What happens if everybody -- if the users jump
2 through the hoops set out through the settlement agreement?

3 In that case, the parents would indicate his or her
4 relationship to the minor, the minor would indicate his or her
5 relationship to the parent, and then the parent would use the
6 controls to either opt the child out or consent.

7 Now, obviously, there, one can imagine fraud, one can
8 imagine people pretending other people are their parents. And
9 I agree with Your Honor, at some -- at the end of the day
10 there -- some things are going to slip through. But, that is a
11 much more serious safeguard and protection for the rights of
12 these minors, all these state laws, accepting a mere
13 representation by the minor that his or her parent consents.

14 And, and the reason that these state laws are so important
15 is, in part, that they're state laws, and there are seven of
16 them, and they cover -- they include three of the largest four
17 states by population, California, New York, and Florida.

18 But, furthermore, both Facebook and class counsel have
19 argued, and they have repeated the argument here today, that
20 California law should control. And if that's the case, then
21 California law, Section 3344, which clearly prohibits this
22 practice, would govern all Facebook users.

23 Now, they don't actually dispute any of this. But
24 instead, Facebook in particular presses the preemption
25 argument, the COPPA preemption argument. And Mr. Rhodes finds

1 it not debatable that COPPA preempts this -- all of these
2 statutes.

3 I'm -- I should -- understated, I find that conclusion
4 surprising. It is true that there is the *David Cohen* case out
5 there, that is a summary decision with no analysis of a state
6 superior court. When --

7 **THE COURT:** Is there any case going the other way?

8 **MR. MICHELMAN:** Not specifically on this issue,
9 Your Honor. But when we look to the law of the United States
10 Supreme Court on preemption, the controlling decision is
11 *Sprietsma versus Mercury Marine*, in which the Supreme Court
12 held that the Coast Guard's failure to provide a specific type
13 of propeller guard -- they considered it and decided against it
14 -- did not expressly or impliedly preempt tort laws in other
15 states that would require the propeller guards.

16 **THE COURT:** Well, there's lots of preemption law out
17 there. I mean, there's not just that case. I mean, we have
18 all sorts of precedent we can look to about how we analyze a
19 preemption argument, and it's either expressly preempted or the
20 various other stages along the path.

21 But the simple fact is in this particular area there's
22 only, I guess, one decision out there, and that is contrary to
23 your view. Now, I understand it's from a state court, so a
24 state trial-level court, I understand that, but the fact is --

25 **MR. MICHELMAN:** Without a lot of analysis.

1 **THE COURT:** But the fact is, there is nothing going
2 the other way.

3 **MR. MICHELMAN:** There is nothing going the other way
4 specifically on this issue, but the -- the arguments are quite
5 weak. The express preemption argument relies on a clause that
6 prohibits treatment, quote, "inconsistent with the treatment of
7 those activities or actions under this section."

8 Well, the treatment of the activities and actions under
9 this section is treatment of activities and actions with
10 respect to 12 and under. It just doesn't say anything either
11 way about 13 to 17. So the express argument, I would submit,
12 is not -- is facially not -- not very persuasive.

13 As to implied conflict management, the Supreme Court has
14 held that it is possible for Congressional or regulatory
15 inaction to have a preemptive effect. But that is only true
16 where, either by Congressional or regulatory design, the choice
17 of the -- the area that has not been regulated has been a
18 deliberate area of nonregulation, that -- that the Federal
19 Government has chosen to leave open.

20 And for example, in *Geyer*, you have a 15-year regulatory
21 history of the Department of Transportation deciding
22 specifically that it wanted to leave the choice open, in the
23 area of auto safety, and not have state laws that provided
24 different standards.

25 Here you have nothing like that. You have a few witnesses

1 at a hearing, and the deletion of a provision that is not --
2 that is never explained, in terms of preempting state laws to
3 the contrary or making sure that minors 13 to 17 have all the
4 kinds of freedom that one could imagine they might have.

5 **THE COURT:** Let me shift the focus for a moment with
6 you. What -- the nature of the harm that is being -- that you
7 identify, that the users are incurring here -- and I -- I
8 realize that this may get into the various statutes that you
9 say are particularly targeted at protecting minors.

10 But, the nature of the injury that you identify, how is it
11 any different between an adult and a 13- to 17-year-old, in
12 terms of using their likeness for purposes of, in this
13 instance, sponsored stories?

14 How is it at all different, and why is it more pronounced
15 for a minor than it is for an adult?

16 **MR. MICHELMAN:** I'm glad you asked that question,
17 Your Honor, and particularly since the parties argue that
18 everybody's claims are the same. And we agree, the claims are
19 the same. But the protections provided by statute are not.

20 The State of California, and six other states as well,
21 have decided that because of minors' youth, there should be
22 more safeguards in place that protect them against rash
23 decisions that they may make when they are 14 years old. That
24 puts the parent in a position to -- to give consent and to have
25 some oversight. That's -- and so even if the injury is the

1 same, the states have chosen to provide a greater level of
2 protection. And the problem with this settlement agreement is,
3 it does not respect that choice. In fact, it authorizes --

4 **THE COURT:** I guess what I'm trying to ask is, what
5 is it about the status of an individual, as a 13- to
6 17-year-old, that you can point me to that says they have
7 incurred this harm, and it's more pronounced because they are a
8 13- to 17-year-old, there's something about the nature of this
9 that is identified as the harm here, which is the use of the
10 likeness without consent, for advertising purposes.

11 Why is that more harmful to a 13- to 17-year-old than it
12 is to an adult? I'm just trying to get a handle on -- I
13 understand your point, and I'm not minimizing it, that
14 legislatively there is some extra protection that you say is
15 there for that particular group of the population.

16 But what is it about the nature of this particular conduct
17 that you think is -- has a particularly pronounced effect on a
18 13- to 17-year-old, as opposed to an adult?

19 **MR. MICHELMAN:** Well, minors -- and the Supreme Court
20 has said this as well -- minors have, in certain respects,
21 diminished capacity for judgment and diminished, for example,
22 culpability in the criminal sphere. And so it's been
23 recognized as a matter of public policy.

24 **THE COURT:** That's why they may click "like" without
25 the benefit of maturity, if such there be. I understand that.

1 But what I'm asking about is, having done that, how have they
2 been injured in a way that is particularly pronounced? In a
3 way that is different from the adult putative class members?

4 **MR. MICHELMAN:** Well, they may have made decisions,
5 they may have chosen to like things and be tagged that way on
6 the Internet forever, without having necessarily thought
7 through the consequences in the manner an adult would. And I
8 sense I may have not --

9 **THE COURT:** So they made a bad decision about what to
10 like.

11 **MR. MICHELMAN:** They made a bad decision, but it is a
12 decision that the legislators of seven states have said they
13 should be protected from. And this settlement authorizes
14 conduct that violates all of those laws, including the law of
15 California, which a party says governs. And that's a serious
16 problem with this settlement.

17 And, several courts have said that courts should not be in
18 the business of approving settlements that authorize or
19 perpetuate violations of other laws. And this does that.
20 Because, as the parties do not dispute, minors' images will
21 continue to be used, under this settlement, without parental
22 consent. And that violates these laws.

23 I would like to address one more point on the minors
24 before I move to the issues of changing the name of sponsored
25 stories. And that is, it's been suggested today by the

1 parties' counsel that minors have all the protection they need
2 because they can just get off Facebook.

3 That was true before this suit was filed. So, in terms of
4 whether this settlement provides any benefit, it doesn't. The
5 minor can always make the decision, "You know what, I'm going
6 to get off Facebook, and withdraw all of this, and step out of
7 this whole area."

8 That's not what the settlement purports to give them. The
9 settlement purports to give them more, purports to give them
10 new options and more protections, and it doesn't do that. For
11 most minors, the law will continue to be violated.

12 So I would like to move on now to the issue of the change
13 in the name of sponsored stories. Both Plaintiffs and
14 Defendants put a lot of stock in the definition section, and I
15 think that's absolutely the right place to turn.

16 This is Section 129 of the proposed settlement agreement,
17 quote (As read):

18 "The term 'sponsored stories' or 'sponsored story'
19 means content displayed by or on behalf of Facebook,
20 that Facebook refers to or markets as sponsored
21 stories."

22 I think that last phrase, "that Facebook refers to or
23 markets as sponsored stories," is critical. The definition of
24 the -- of what this injunctive relief covers, and the term
25 "sponsored stories" is used repeatedly in the injunctive relief

1 provisions of Section 2.1, that term is defined by reference to
2 how Facebook refers to and markets it.

3 So Mr. Rhodes makes slighting reference to the exhibits we
4 have cited, saying thing like, "The idea of sponsored stories
5 isn't going away, just the name is changing."

6 Well, I understand why Mr. Rhodes would like the idea to
7 be the critical thing, but that's not what the words say in
8 this settlement agreement. The words say that the words, what
9 Facebook refers to and markets as "sponsored stories," is the
10 critical thing.

11 **THE COURT:** Well, but he, in fairness, has pointed
12 out that it's a bit broader than that. It's not -- if they
13 simply, tomorrow, labeled "sponsored stories" as "fun facts,"
14 and put it out there, or something like that, and didn't abide
15 by the injunctive relief, they would be subject to the audit,
16 and they would have various ramifications.

17 I mean, in other words, you are not simply suggesting that
18 they could, under the terms of the settlement agreement, simply
19 put a new name on it and blissfully go about without
20 implementing any aspects of the settlement agreement.

21 **MR. MICHELMAN:** I am, Your Honor.

22 **THE COURT:** I don't agree with you.

23 **MR. MICHELMAN:** I think if we were here -- if they
24 violated these provisions and they were dragged into court,
25 Mr. Rhodes would be up here arguing that "sponsored stories"

1 only means, just as it says in 129, what Facebook refers to or
2 markets as sponsored stories.

3 **THE COURT:** Well, he just said the contrary. So he
4 couldn't say that, because he's already said that's not the
5 case.

6 Now, where is it that you think it is so limited? Because
7 I do see it as saying -- effectively what sponsored stories is
8 doing, whatever label, whatever one may put as the label and
9 the name for it, that's covered.

10 **MR. MICHELMAN:** Well, I think it is whatever they
11 called "sponsored stories." And the rest of the paragraph is
12 just giving examples of the things they currently call it.

13 But even taking Your Honor's point that this could be read
14 broader, and perhaps Facebook would be judicially estopped -- I
15 would hope they would -- to deny that it covers a
16 reincarnation, because Facebook is changing its practices, we
17 don't know exactly what that reincarnation looks like. We
18 don't know if the terms of the settlement in 2.1 are going to
19 be meaningful, as against whatever new product Facebook comes
20 up with.

21 And that's a source of concern to objectors, because what
22 limited relief this offers, in terms of the rights of -- the
23 rights of certain minors to get parental consent, and the
24 rights of certain -- certain users to opt out of certain
25 categories after they have seen a sponsored story, again, these

1 are all fairly limited, but we don't even know how they would
2 apply, because we don't know --

3 **THE COURT:** But of course, the release wouldn't
4 necessarily cover that conduct. Because the language of the
5 release is also important. If the point you are trying to make
6 is they could come up with an entirely new program that you
7 think does harm to minors, amongst others, that wouldn't
8 necessarily be covered by the release that they have agreed to
9 in this agreement.

10 **MR. MICHELMAN:** Well, the release is fairly broad
11 because -- and Mr. Zigler will discuss this in more detail, but
12 one point on the release is that it covers claims which the
13 releasing parties have or may have against the released parties
14 arising out of, or relating to, any of the acts, omissions, or
15 other conduct that was or could have been alleged in this
16 action, including but not limited to sponsored stories. So it
17 -- it goes beyond what they are doing now, and could be read to
18 release additional conduct as well.

19 And, and again, you know, I would welcome hearing
20 Facebook, and -- well, in particular, Facebook say, oh, that --
21 that -- you know, in front of you, and in a manner that would
22 create judicial estoppel -- that this release is much more
23 limited than that.

24 But I'll -- I'll defer to my fellow objecting counsel,
25 Mr. Zigler, in discussing the release further.

1 **THE COURT:** Okay. Why don't you summarize, or bring
2 it to a conclusion.

3 **MR. MICHELMAN:** Sure. To sum up, the lack of
4 protection for minors for continuing violations of state law
5 is, by itself, a reason to object -- to reject this settlement.
6 Because the courts, the federal courts should not be in the
7 business of authorizing agreements that perpetuate or authorize
8 the violations of state law.

9 There is no dispute, this will continue to do that by
10 permitting Facebook to use minors' likenesses without their
11 parents' consent.

12 And now I'll turn it over to objecting counsel, Robert
13 Fellmeth, on behalf of the Children's Advocacy Institute.

14 **THE COURT:** Thank you. We will hear from
15 Mr. Fellmeth, and then we will take a brief break after
16 Mr. Fellmeth.

17 **MR. FELLMETH:** Thank you, Your Honor. May it please
18 the Court, I have as Exhibit 12 from the materials here I would
19 like to hand to the Court, and I have eight copies here for
20 everybody --

21 **THE COURT:** Very well.

22 (Document handed up to the Court)

23 **MR. FELLMETH:** -- the terms and conditions -- or not
24 -- rights and responsibilities of Facebook, followed by the
25 changes being made under this court -- proposed court order.

1 **THE COURT:** Very well.

2 (Reporter interruption)

3 **MR. FELLMETH:** Sorry.

4 Your Honor, I apol -- --

5 **THE COURT:** Just -- yes, go ahead. You're about to
6 tell me what I was going to ask, which is to identify who
7 you're representing. Go ahead.

8 **MR. FELLMETH:** I'm Bob Fellmeth, of the Children's
9 Advocacy Institute, on behalf of the Depot family. And also on
10 behalf of child advocates generally, I must say.

11 Now, I want to cover some points here that the Court's
12 already raised: Why are teenagers different? Because they
13 post things without thought, because they post things they
14 shouldn't post, because they post things they regret. Because
15 they're engaged in cyber bullying. Because they're not mature
16 adults yet.

17 And I represent them, and have for 22 years.

18 **THE COURT:** Although the premise of they post things
19 without thought is certainly not confined to minors, but --
20 okay.

21 **MR. FELLMETH:** It is not, but it is a worse problem
22 with teenagers. And I think any parent with a teenager will
23 verify this. It is a particular problem with teenagers. And
24 the damage that comes is enhanced with teenagers.

25 Now, I agree with the Court that whether it's sponsored

1 stories or called "sponsored stories," I don't care about that.
2 I am more concerned that, if you look at the last two pages of
3 what I've given you, laying out what the changes being made
4 here, it moves from (As read):

5 "You can use your privacy settings to limit how your
6 name and profile picture..."

7 (Reporter interruption)

8 **THE COURT:** You need to slow down.

9 **MR. FELLMETH:** Sorry. This is a bad habit I have.
10 Reporters always hate me. (As read)

11 "...may be associated with commercial, sponsored, or
12 related content, such as a brand you like, served or
13 enhanced by us. You give us permission to use your
14 name and profile picture in connection with the
15 content, subject to the limits you place. We do not
16 give your content or information to advertisers
17 without your consent. You understand that we may not
18 always identify paid services and communications as
19 such."

20 Now, I submit that the changed one is much worse for
21 children, much more -- much broader, much more -- of much
22 greater concern. And, as the Court has mentioned, not at all
23 confined to sponsored stories. (As read)

24 "You give us permission..."

25 This no longer a permission with regard to a particular

1 recasting of your postings that we are going to send to some
2 unnamed group. Now we are saying "You give us permission"
3 categorically here, automatically, as a term and condition,
4 No. 10 of 18, in the small-print list:

5 "...to use your name, profile picture, content, and
6 information, in connection with commercial,
7 sponsored, or related content, such as a brand you
8 like..."

9 "Such as."

10 "...served or enhanced by us. This means, for
11 example..."

12 And then there's an example:

13 "...permit a business or other entity to pay us,
14 display your name and/or profile picture with your
15 content or information. If you have selected a
16 specific audience for your content or information, we
17 will respect what choice...your choice when we use
18 it."

19 Keep in mind, though, that the limits on where the stuff
20 goes is in a very difficult-to-find place in the settings area,
21 which is not -- you can't get access to that from your profile
22 page. You've got to go out, and you've got to go in, and
23 you've got a default entry of "Public." Everybody gets it.

24 So, let me recast this in terms of the teenage problem we
25 have here.

1 **THE COURT:** Okay. And I'll let do you that, but I
2 want you to keep in mind, to step back in this process.

3 My function here is not to craft the perfect policy for
4 minors. That's not what I'm entitled to do. What I am to do
5 here is to determine whether or not this particular settlement
6 that has been proposed to me for approval is fair, reasonable,
7 and adequate. Not could I craft a better policy, or could you
8 craft a better policy? That is not the -- that isn't the world
9 in which I operate.

10 So when you are making your arguments, to the extent that
11 the argument is "Boy, there's a better way do this," that
12 really doesn't go to the -- the function that I have to engage
13 in at the moment.

14 It really is, this -- this particular remedy is valueless,
15 it's not fair, it's not reasonable. I mean, adequate, there,
16 you may be closer to it, in terms of what you are arguing.
17 But, just to keep in mind, it is not "Can this be done with
18 more protection for a minor," because I am not in a position to
19 craft it. I am here to either accept or reject.

20 So just keep that in mind, and go ahead, Mr. Fellmeth.

21 **MR. FELLMETH:** I understand, Your Honor. I wanted to
22 emphasize, in terms of what is fair and reasonable, the bottom
23 line about what this means, you're giving to a third-party
24 commercial entity, based on this terms and conditions sign-off
25 (Indicating), the right to take anything you post, to select

1 from it without telling you in advance that you are doing it,
2 without telling you exactly where you're sending it or what
3 you're doing, recast it, then send out to a group of people.
4 You don't know who they are, and you may never know who they
5 are.

6 Now, this is going on, on the Internet. So that when
7 somebody gets it, the recalculation, the recasting of what you
8 have posted -- and I know this is all atmospheric here about,
9 "Oh, these are sponsored stories, it's 'Like,' it's all
10 benign." It doesn't have to be benign. It may not be benign.
11 It may be very, very horrible for the kid involved.

12 So, it goes out. It's permanent. It goes out, and it's
13 there. And whoever receives it, resends it to other people.
14 This is a very momentous thing that is happening for a teenager
15 posting things many times they should not be posting. We want
16 to have the parent involved in this. There's a fundamental
17 liberty interest apparent in this country.

18 And I want to add something to the COPPA issue. Because
19 we have statutes to protect kids, and there's a reason for
20 them, the statutes in this area and on this subject matter. I
21 was involved in COPPA. I have been involved in the FTC
22 regulations to implement it. Yes, the 13- to 18-year-olds were
23 not included, because we wanted 0 to 12 very harshly included.
24 And for the 0 to 13, including 12-year-olds, you can't even
25 collect the information, they can't even get into Facebook,

1 without verifiable parental. In other words, it is a very high
2 floor.

3 Because you create a very high floor for 0 to 13 does not
4 mean you have destroyed the floor that exists for 13 to 18.
5 That is not what that means. And that is not a reasonable
6 interpretation of a preemption theory in this regard.

7 So if you then look at 3344, and see what it says and read
8 it, is it not being violated? If you look at the Family Code,
9 and look at it, and say is it not being violated? They say,
10 "Oh, no, this is not a delegation. The Family Code says you
11 can't require delegation. This isn't a delegation."

12 Really? You are saying, "Facebook, you can do whatever
13 you want, whenever you want, to whomever you want, without
14 telling me in advance what you are doing and to whom and
15 where." That is not a delegation?

16 So A is met; C, under *Fife*, is met there. I think that is
17 a very weak case. I don't even know if I agree with *Fife*,
18 on C. I agree that if you are paying for something, a child
19 can be held to that contract. They're receiving the benefits,
20 there's an estoppel concept, fine.

21 But keep in mind that what we're talking about here is not
22 a one-dollar addition to the Facebook charge or something. It
23 is the imposition of an entirely different service. There are
24 two different services here. A former antitrust prosecutor,
25 I'm always looking at relevant market. There's a relevant

1 service market here of social networking. Very attractive,
2 excellent product. I'm a member of Facebook. My kids are.
3 Excellent product.

4 There's a separate market called "commercial
5 endorsements." A different market, different service market.
6 Different people are involved. The advertisers are involved.
7 It's separate.

8 It's a mistake to tie the two together and say it's all
9 the same thing, which is what they're doing, and consent for
10 one means consent for the other.

11 Indeed, in antitrust law, if you have market power in one
12 service-relevant market, and you use it to jack up distorted
13 advantage in the other market, that's a per-se tie-in. You
14 can't do that. They've got to be kept separate. They are
15 logically separate. You can't use a power in one to get an
16 advantage in the other.

17 Now, my point there is that you can't give consent -- say
18 consent of one is consent to the other when they're not the
19 same. They're different. Different things are happening here.
20 You've got -- now, I'm not saying that the Court has to say it
21 has to be perfect, it has to be exactly as Fellmeth wants it,
22 or whatever. I'm not saying --

23 (Reporter interruption)

24 **MR. FELLMETH:** I'm not saying that it has to be
25 perfect. I'm not saying that the Court has to impose some kind

1 of arbitrary anything.

2 **THE COURT:** I can't impose an arbitrary --

3 **MR. FELLMETH:** I know you can't. All you can do is
4 say no. What I'm suggesting is you say no to any inclusion of
5 minors, given 3344, given the fact that COPPA is not preempt,
6 given that California law applies -- and you're talking to a
7 California attorney for 45 years -- California law applies --
8 who wrote some of these statutes. And the statutes are not
9 preempted. They are there to protect the kids. There is a
10 reason for them.

11 And if they wanted -- if they want to have a settlement
12 that says -- and it's not hard to do, not hard to do -- to say,
13 "Kid, if you have a parent on Facebook, let us know, and if you
14 want to do it, we will take whatever we're going to be doing,
15 whatever -- we're going to be recasting your posts, we're going
16 to be recasting them, we're going to be sending them to a
17 group, we'll copy and paste."

18 That takes them no time at all. That's nothing. Copy and
19 paste, send it to the parent, and say, "Click 'yes,'" just
20 "Click 'yes.'"

21 Can that be evaded in some way? Can the kids cheat? You
22 know, kids come home, say, you know, "The dog ate my homework,"
23 signed "Mom"? I mean, yeah, sure, they can. Sure, they can.
24 But all we are asking on behalf of children is the bona fide
25 attempt -- and their parents -- to get parental consent to

1 something that is very momentous, permanent, going out without
2 prior warning. It doesn't work. It's not beneficial. It's
3 not adequate, it's not fair, it's not reasonable.

4 I'm asking for the Court to take a close look and to think
5 about this. This is a -- this is a "wears no clothes" issue.
6 The kid is wearing clothes (Indicating), but the knights behind
7 me (Indicating) are not wearing clothes here.

8 I'm asking the Court to *tabula rasa*, look at what it does
9 and whether or not it complies reasonably with minimum state
10 statute, minimum common law, with regard to the fundamental
11 interest of parents, with regard to 3344, with regard to the
12 Family Act.

13 And by the way, one other just side issue, they say, well,
14 the Family -- the Family Code has this provision in it that
15 selects out actors, that is, people who get paid for acting or
16 art or singing or whatever. And that demonstrates that nobody,
17 that -- that unless you're in that category, you're not covered
18 at all. And again, it's the opposite. Again, it is a really
19 high standard for those people, eight pages of standards,
20 including even how much they're going to get paid, a minimum
21 amount they have to get paid is in the statute. Doesn't mean
22 that the kids who are not getting money for doing things, art
23 or athletics or whatever, are bereft. It's, again, a higher
24 standard for them.

25 And by the way, those kids are going to be in this

1 (Indicating) as well. Even the kids who are receiving money
2 for art or whatever are going to be subject to this
3 expropriation of their postings. Direct violation of the
4 detail they paid for. They don't have any mechanism for that
5 either.

6 So, okay, I'm sorry for -- I'm emotional because I've had
7 teenage sons.

8 **THE COURT:** Okay. Well --

9 **MR. RHODES:** Your Honor --

10 **THE COURT:** Okay.

11 **MR. RHODES:** For the Record, what counsel, I believe,
12 is attempting to put before the Court is in the Record at
13 Docket No. 339, which is Paragraph 12 to the Weinmann
14 declaration. I don't think it was ever established on the
15 Record what it was he was waving around.

16 And I would note that this is, I believe, the SRR in
17 effect for the period of October of 2010, and through October,
18 2011. So it's kind of a -- really doesn't apply to anything.

19 Thank you.

20 **MR. FELLMETH:** It's what essentially is being
21 changed. It was a -- not immediately preceding, but very close
22 to immediately preceding.

23 **THE COURT:** Thank you. Let's take a -- so that the
24 court reporter who has been in a challenging situation in terms
25 of following all the comments, let's take a break, and we'll

1 resume at quarter of.

2 And, again, I'm looking to conclude these proceedings at
3 12:30, so please do keep that in mind. Okay?

4 (Recess taken from 11:33 to 11:41 a.m.)

5 **THE CLERK:** Remain seated. Please come to order.

6 **THE COURT:** Very well, we are back on the Record.

7 And, Counsel, you may proceed. If you could identify
8 yourself and who you are representing.

9 **MR. SHERWOOD:** Thank you very much, Your Honor. Good
10 morning. My name is Alan Sherwood. I represent Objector
11 Jennifer Deachin.

12 Ms. Deachin has asked us to request that the Court not
13 approve the proposed settlement at this time. Our basic
14 position has been briefed, so I don't want to repeat what is in
15 the brief.

16 We believe that Ms. Deachin and all the members in the
17 class should get a second notice after determining the number
18 of participants that want to be in the class, and fairness
19 would then entitle the participants to be told, based on the
20 number of people in the class, whether or not to opt out at
21 that point. That it was premature with the notice that's been
22 presented.

23 I also had some comments to make about the fees, which
24 I'll reserve for later, but that is basically the two issues
25 that we wanted the Court to look at.

1 **THE COURT:** So you are saying, a second opportunity
2 to opt out is what you are thinking should be provided?

3 **MR. SHERWOOD:** Because of the vagueness of what the
4 proposed settlement would actually be to the class members.

5 **THE COURT:** In terms of the amount of money they
6 would receive?

7 **MR. SHERWOOD:** Exactly. That it would be more
8 reasonable, and that it would be a more informed consent-type
9 of notice, if they were given notice after the number of
10 participants was determined.

11 **THE COURT:** Suppose, though, that if they -- the
12 initial notice said \$10, but it could be a different amount, if
13 the amount then is increased, why would somebody then want to
14 be opting out at that point? It's only getting more.

15 **MR. SHERWOOD:** Well, Your Honor, I don't have a good
16 explanation for that.

17 **THE COURT:** Okay. Okay. Thank you.

18 **MR. SHERWOOD:** Very . Thank you.

19 **MR. FRANK:** Good morning, Your Honor.

20 **THE COURT:** Good morning.

21 **MR. FRANK:** Theodore H. Frank, with the nonprofit
22 Center for Class Action Fairness, on behalf of Objector Sam
23 Kazman and myself.

24 **THE COURT:** Very well. And you expressed an interest
25 in seeing the summary, and I'm happy to provide it to you, if I

1 can find where I put it.

2 **MR. FRANK:** I can forego that at the moment.

3 **THE COURT:** All right. Okay. Go ahead.

4 **MR. FRANK:** I would like to raise two 23(a)(4)
5 issues. First of all, the *Radcliffe* issue. And the animating
6 concern of the Ninth Circuit in *Radcliffe* is whether the
7 incentive fee paid to the class representative so distorts
8 their incentives to agree to a settlement that their interests
9 diverge from the class that they are supposedly representing.

10 And that's not just the Ninth Circuit. That's the
11 Eleventh Circuit, in *London versus Wal-Mart*; that's the Sixth
12 Circuit, in *Midland Funding*. The D.C. Circuit's a bit on the
13 other side on that.

14 The parties argued that the \$12,000 that the parties are
15 getting is okay because they are facing a risk from 3344 fee
16 shifting. I would argue that that cuts in exactly the opposite
17 direction. Because what the parties are getting are not just
18 \$12,000, but they're freeing themselves from the risk of
19 3344 fee shifting that the class does not have.

20 And so they are getting more than \$12,000. They are
21 getting \$12,000, plus the option value or the expected value of
22 the risk of 3344 fee shifting. And that's exactly the sort of
23 distorted --

24 **THE COURT:** How do the class members have that risk?

25 **MR. FRANK:** Because the 3344 fee shifting would

1 not -- Facebook would not say, "Okay, here's our \$5 million
2 attorney bill, and we are going to bill every class member
3 28 cents." That's not how that works.

4 **THE COURT:** Right.

5 **MR. FRANK:** At least the class members would have the
6 opportunity to opt out before --

7 **THE COURT:** I'm not sure I follow you, why the fact
8 that the named class representatives could be at risk under
9 3344 in a fee shifting; that, therefore, is it -- your point is
10 that they have an extra interest in agreeing to the settlement
11 to avoid the prospect of a fee shift?

12 **MR. FRANK:** That's exactly right, Your Honor.

13 **THE COURT:** Okay. We had a long discussion about the
14 language in *Radcliffe*, and the focus of *Radcliffe*. And I do
15 think it is a fair reading of that opinion by Judge Gould, that
16 the particular issue that was in play was the nature of that
17 agreement by which the named plaintiffs essentially tied
18 themselves to joining forces seeking approval of the
19 settlement. And that is not what we have here.

20 **MR. FRANK:** I completely agree with that. What
21 happened in *Radcliffe* was certainly sufficient to trigger the
22 23(a)(4) problem. It isn't necessary. And we see that in
23 *Rodriguez*, where the Court criticized an incentive payment
24 agreement that was capped out depending on how much the class
25 received.

1 And there, well, then the class might have an incentive to
2 settle at that capped-out amount and not seek anything more so
3 that they could guarantee the maximum incentive. And the
4 *Rodriguez* court held that that was problematic.

5 **THE COURT:** The remedy for the concern that you are
6 presenting to me is that I simply reduce the incentive fee
7 amount?

8 **MR. FRANK:** That's one way to approach it. That
9 still creates -- there would still be the 23(a)(4) problem,
10 that the class wouldn't be an adequate representative because
11 they're facing a completely different set of risks and benefits
12 that the rest of the class isn't having.

13 **THE COURT:** But to some extent, isn't that
14 ameliorated by the fact that the Court has to make the
15 determination on whether or not the proposed settlement is
16 fair, reasonable, and adequate?

17 So, to the extent that your concern is, by -- by
18 definition, these class representatives are in a conflict
19 situation such that they agreed to something that perhaps they
20 shouldn't have agreed to, I -- I understand that being part of
21 the argument.

22 But then, at the point that it is presented to me, if I,
23 on the one hand, reduced the incentive awards, and, number two,
24 I deem it to be fair, adequate, and reasonable, I'm not sure
25 how the process has been infected, if you will, by these class

1 reps.

2 **MR. FRANK:** Certainly, the incentive payments might
3 be unfair under 23(e), and you could fix that 23(e) unfairness
4 by reducing the incentive payments.

5 We're taking a different position, that there's a 23(a)(4)
6 problem. That the class representatives have an incentive to
7 agree to a settlement without regard to whether they are fairly
8 representing the class, because of this risk that they face.
9 And, and, according to class counsel, that was a very
10 substantial risk that, in part, motivated the settlement.

11 Our second 23(a)(4) point is that we're talking about the
12 class members who get this \$15, which I think the Court should
13 exercise its discretion enough at 17 or 18 dollars to exhaust
14 the settlement fund, rather than have money to go to *cy pres*.

15 But what's really happening is that there are two
16 subgroups, one of whom gets the \$15, like my client,
17 Mr. Kazman; and then another subgroup of potentially millions
18 of class members, who get zero under the settlement because
19 they are not allowed to make a claim without perjuring
20 themselves. And that's the subgroup that includes me. I could
21 not make a claim because before I can make a claim, I had to
22 attest to things that just weren't true.

23 These two subgroups are uncertified. They're not
24 separately represented. The parties argue it's okay that
25 Kazman gets \$15, and Frank gets zero dollars, because they have

1 completely different claims. Kazman has one type of cause of
2 action, and Frank has a completely different cause of action,
3 because we would have affirmative defenses against Frank that
4 we wouldn't have against Kazman.

5 But that's just a concession that the class shouldn't be
6 certified. That this isn't one single unitary class. That
7 there are really two subclasses here that haven't been
8 separately represented, that haven't been separately certified,
9 and haven't been requested to be separately certified.

10 And that creates the 23(a)(4) problem that we identified.
11 That's *Amchem*, that's the *Literary Works*, that's *Dewey versus*
12 *Volkswagen*. And all of them have slightly different facts, but
13 the principle is the principle.

14 Under *Comcast versus Behrend*, when you have those sorts of
15 individualized differences, you can't group them together into
16 a single class. You either need to say the class is equally
17 situated, and you treat every class member alike, or you say
18 the class is differently situated, and they have individualized
19 differences, and you subclass accordingly, and you separately
20 represent accordingly so that the disfavored subclass is fairly
21 represented at the settlement discussions.

22 We've extensively briefed a lot of other issues. I'm
23 happy to answer questions on those. I do want to raise one
24 rebuttal point. We heard here that there are just very few
25 objections, whatever the infinitesimal amount is. And,

1 Your Honor, that's why we have class actions. Because it would
2 be un- -- infeasible for an individual to bring the individual
3 claim, you group them together and you aggregate the
4 litigation.

5 And I got attacked in the papers: I hate class actions.
6 Well, I don't hate class actions. It's a good way to aggregate
7 these sorts of claims. It's a good procedural device. But
8 then you can't turn and say, "Aha, all these objectors who have
9 even less incentive than individual class members to bring
10 claims, you didn't have 71 million objectors, and, therefore,
11 the majority of the class supports the settlement."

12 And you can't make that inference. I think if you were to
13 poll a thousand Facebook members and say, "Here's a settlement,
14 and it pays some class members \$15, and it pays other class
15 members zero dollars, and it pays the attorneys \$1,000 an hour,
16 do you think that's fair?" We know that they're never going to
17 conduct that study because they would find that a majority of
18 class members answering it would say, "That's outrageous. It
19 shocks the conscience."

20 And you can't say that there are only 104 objectors who
21 jumped through all the hoops, and, in fact, we're going to say
22 that 87 of them didn't jump through the hoops because we were's
23 going to impose a different requirement that wasn't in the
24 notice or in the preliminary order, and call those objections
25 invalid.

1 Your Honor, I won *Bluetooth* in the Ninth Circuit, I won
2 *Inkjet* in the Ninth Circuit, I won *Nachshin versus AOL* in the
3 Ninth Circuit on class action settlement appeals from
4 approvals. And every one of those, there are fewer objections
5 than here.

6 It's not the number of objections, but it's the quality of
7 the objections that matters when you're looking at the
8 reactions of the class. If they came here, and the class had
9 had full notice and nobody objected, they can say, "See, the
10 class doesn't have a problem with this."

11 **THE COURT:** At the end of the day -- so your view as
12 to what should happen -- obviously you're saying I should
13 reject the settlement. But is effectively what you are saying,
14 is that this case, this particular case should simply run the
15 distance?

16 I mean, that it's not a -- it is not a settleable case
17 from a class action perspective? The Court should just either
18 try it, or rule, or dismiss it? Or -- I mean, I'm trying to
19 get a handle on where you think this all goes if I went down
20 the path you ask me to go.

21 **MR. FRANK:** I think that's a fundamental problem with
22 3344. If you look at the statute and why it was passed, it was
23 passed to protect actors from being unfairly taken advantage
24 of, and Fred Astaire dancing with the vacuum cleaner and all
25 that.

1 It's -- or, or, nobody ever envisioned when they passed
2 the statute that common everyday people that normally nobody
3 cares about would be grabbed to use for endorsements. And
4 they're trying to shoehorn that square peg into the circular
5 hole of 3344.

6 And it may be the case that 3344 isn't conducive to class
7 actions, at least class action settlements. And that is a risk
8 that parties have to take going forward, as the Supreme Court
9 held --

10 **THE COURT:** It puts the defendant in a rather
11 difficult bind because the defendant then, who wants to settle,
12 then has to continue to litigate. And you've sort of won the
13 battle, perhaps lost the war for them. I mean, in a way you're
14 saying this shouldn't be subject to -- you just decide the
15 question and litigate the case. And --

16 **MR. FRANK:** Well, if the Defendant is really
17 concerned about that, and they want a settlement more than
18 anything else, they can remove the 3344 Sword of Damocles over
19 the class members' head, and they can say before settlement
20 negotiations start, "We will not seek 3344 fee shifting in this
21 case."

22 And once they do that, then the class representatives can
23 fairly decide, "Yes, I want to go forward with the litigation,"
24 "No, the settlement is good for the class," without concern
25 that they have bound themselves to the mast and are facing a

1 financial disaster if they don't agree to a settlement that may
2 or may not be unfair.

3 And the concern is under 23(a)(4), not are the parties
4 adequate representatives. And that is a preliminary question
5 before you get to the 23(e) question. It's not, "Well, because
6 they negotiated a settlement that is conceptually conceivably
7 fair, that could have been possibly negotiated by somebody who
8 wasn't facing these conflicts, then I'm going to go back and
9 decide that they were adequate representatives."

10 **THE COURT:** Okay. Thank you.

11 **MR. FRANK:** Thank you, Your Honor.

12 **THE COURT:** Thank you.

13 **MR. ZIGLER:** Thank you, Your Honor. My name is Aaron
14 Zigler. I'm here on behalf of the Shane objectors. I'm going
15 to try to bring us home.

16 My comments are going to be limited to the release, the
17 proposed release to the settlement. And then I'm going to try
18 to bring that, steer that back to the ultimate question which
19 is before the Court, which is whether or not the settlement is
20 fair, reasonable, and adequate, which I think we're getting a
21 little far from at times.

22 The release that's before the Court, to put it kindly, is
23 ambiguous. There's been several arguments on every side of
24 that. There's been arguments that the release, itself, covers
25 far more than sponsored stories. You have heard those.

1 Mr. Arns, on behalf of Plaintiffs, has argued that no, it
2 is limited to just the sponsored-stories claims. Then, when
3 prompted with an argument that, you know, maybe sponsored
4 stories are going away or changing, we were directed to the
5 definition of "sponsored stories," which was very broad, and
6 included not just things called "sponsored stories," but other
7 things that looked or acted like sponsored stories. Which then
8 brings us back to the release.

9 What is released? Just those things that are called
10 sponsored stories? Or anything that looks or acts like a
11 sponsored story, as well?

12 And the reason that that's important, and the reason that
13 it affects whether or not you can determine if this settlement
14 is fair, reasonable, or adequate, is because without knowing
15 what the class is giving up, you can't properly measure what
16 the value to them was.

17 **THE COURT:** How can you ever craft a release that's
18 going to be as precise as you suggest?

19 **MR. ZIGLER:** I'm not suggesting I'm precise. I'll
20 give you a concrete example, Your Honor. We can do it in the
21 context of the *CMD* litigation, and it goes this way:

22 As has been discussed, the *CMD* covers advertisements where
23 it has a name or likeness. It includes both sponsored stories
24 and another group of ads that are called "social ads," --

25 **THE COURT:** Uh-huh.

1 **MR. ZIGLER:** -- right?

2 So the question then is: Does this release knock out just
3 sponsored stories, or social ads?

4 Mr. Arns has said just sponsored stories. Facebook stood
5 silent. I would really like to hear from Facebook today that
6 it's just social ads and not -- not -- social ads. We haven't
7 heard that from them yet.

8 But then, when you look at this definition of "sponsored
9 stories" here today, and the question of what the release
10 really gets rid of, and what the injunctive relief really deals
11 with, if you look at this definition of "sponsored stories,"
12 and not just those things called "sponsored stories," but also
13 those things that act like sponsored stories, it looks a lot
14 more like it covers more than sponsored stories, and also
15 social ads.

16 And here's why that's important: If it covers more than
17 sponsored stories, then the math that Mr. Rhodes gave you
18 earlier is off by a factor of ten. Because the information
19 that he gave you was limited to the profits and the earnings
20 that they earned on sponsored stories only, not on social ads.
21 That's why this -- this point --

22 **THE COURT:** You know, that goes back to questions
23 I've had all the way along.

24 The focus on -- on the revenue, or the profit or what have
25 you that Facebook may or may not have enjoyed by virtue of

1 these programs does not -- the premise of your argument seems
2 to be it automatically then gives us a -- the boundaries of the
3 harm that individuals have incurred. And one does not follow
4 from the other.

5 **MR. ZIGLER:** No, that's exactly right, Your Honor.
6 And that's one of the reasons why you correctly rejected the
7 settlement the first time.

8 The value to Facebook does not equal the harm to the
9 Plaintiffs. All of that should be thrown out. There's no way
10 that you can measure the settlement on those grounds.

11 **THE COURT:** But then, I thought you just told me that
12 because I -- I thought you were telling me that because
13 Facebook -- depending on the position that they take in terms
14 of the scope of the release, that their revenue or their profit
15 for activities beyond sponsored stories should go into the
16 hopper. I thought I heard you say that.

17 **MR. ZIGLER:** If you're going to use that as your
18 basis, then you have to use the proper universe.

19 **THE COURT:** I see. Okay.

20 **MR. ZIGLER:** But here's the way that it should be
21 done, Your Honor. When determining -- you look at this as an
22 individual case.

23 If I came in here and said, "My likeness has been used,
24 and I want to sue under 3344, I'm entitled to \$750, that is
25 what I like," Mr. Rhodes says, "Well, I'm going to offer you

1 50 bucks," you know, we would talk about that.

2 I know that at the end I could get \$750-plus attorneys'
3 fees, or I could take Mr. Rhodes off for \$50 now. That's where
4 we do the math there. That's *Mars Steel*, from where I come
5 from.

6 **THE COURT:** So you are focusing in on the statutory
7 damages?

8 **MR. ZIGLER:** Your Honor, I was just using that as an
9 example.

10 **THE COURT:** Okay.

11 **MR. ZIGLER:** You look at what the Plaintiffs could
12 recover. Okay. And here is why the release is important
13 there.

14 So, to determine what the Plaintiffs here can recover, on
15 that side of the equation, we have limited it to sponsored
16 stories. 123 million people were in a sponsored story, and the
17 parties have agreed to limit their analysis, for whatever
18 reason, to just one.

19 We haven't looked at the number of times that their
20 likeness was used, which is probably the proper manner, right?
21 Because if I have been used in ten sponsored stories, I should
22 be entitled to more than some person who was used once. Right?

23 So, let's say it was 123 million sponsored stories,
24 instead of people, which is what the math should be. If you
25 add in ads to that, now it's 300 million. And that throws off

1 the math again.

2 So now, instead of the \$5 compensating me for the handful
3 of sponsored stories I'm in, they're offering \$15 now for not
4 only the sponsored stories that I was in, but also the social
5 ads and whatever else this release might cover. Without
6 knowing what the release covers, we can't know if the offer is
7 adequate, under the requirements of Rule 23.

8 For the rest of our objections, Your Honor, we will rest
9 on our briefs.

10 **THE COURT:** Very good.

11 **MR. ZIGLER:** Thank you.

12 **THE COURT:** Thank you.

13 Do we have any other objector counsel or objectors who
14 wish to make any presentation?

15 (No response)

16 **THE COURT:** Okay.

17 **MR. RHODES:** Your Honor, let me jump in. On the last
18 point, *Lane* teaches -- this is 696 F.3d, 811, Page 8231 -- *Lane*
19 teaches, quote (As read):

20 "We reject objectors' argument insofar as it stands
21 for the proposition that the District Court was
22 required to find a specific monetary value
23 corresponding to each of the Plaintiffs' statutory
24 claims and compare the value of those claims to the
25 proffered settlement award."

1 Mr. Zigler is legally infirm.

2 Two, if you look at the cases cited in our brief, *Officers*
3 *for Justice*, 688 F.2d, 615, and its progeny, as you have
4 alluded to, this, today, is not a trial. This, today, is not
5 an adjudication of claims. This, today, is not an evidentiary
6 hearing. The question presented is a very different one, and
7 the Court is very mindful of that standard.

8 But the premise of all these objections, as if you were
9 adjudicating claims that are disputed -- Mr. Michelman said
10 that there's a body of law that says you can't sanction, as a
11 settlement in a class action, the imposition of injunctive
12 relief where you are enjoining compliance with law. But the
13 underlying premise there is that there has been a definitive
14 ruling of law to which the injunction is identical.

15 And here we have a diaspora, a myriad set of claims that
16 are subject to debate. Things like does COPPA preempt
17 everything.

18 There's a fundamental misunderstanding about 3344. The
19 body of jurisprudence under that statute says consent can be
20 manifested in a variety of ways. Implied consent. Express
21 consent.

22 So, the assumption that we're litigating and, therefore,
23 adjudicating these claims today is fundamentally false and
24 wrong.

25 **THE COURT:** I understand your overriding comment here

1 is that no one has made any decisions on the applicability of
2 the defenses, of which there are many, that you have presented.

3 **MR. RHODES:** Many.

4 **THE COURT:** Let me ask you some specific things that
5 have been brought up, and let's go to Mr. Zigler's point, he
6 being the most recent person up here. And that is the scope of
7 the release.

8 **MR. ARNS:** Your Honor --

9 **THE COURT:** Sure -- well --

10 **MR. ARNS:** Let me address that, please.

11 **THE COURT:** Each of you will get your chance to
12 address --

13 **MR. ARNS:** May I go first?

14 **THE COURT:** Go ahead, Mr. Rhodes.

15 **MR. RHODES:** There's a case on point. This is the
16 Hesse case. I think the Court is familiar with it. I've
17 pulled it. This is 598 F.3d, 581, Your Honor. This is a 2010
18 Ninth Circuit case. And Page 7 of the slip opinion -- I
19 apologize, I can't give you the jump site. But what the court
20 says there is, the release is absolutely permitted to include
21 unknown claims.

22 And the question presented, then, in a second class
23 action, in this instance -- I assume Mr. Zigler would say the
24 Dawes case that is before you -- is when you have a final
25 judgment in the first class-action settlement, that goes to say

1 we have wended ourselves through the appeals and we have a
2 final judgment, what Ninth Circuit says is the test that you
3 would then be asked to do, assuming we had a settled complaint
4 in *Dawes*, which we don't (As read):

5 "A settlement agreement may preclude a party from
6 bringing a related claim in the future, even though
7 the claim was not presented and might not have been
8 presentable in the class action where the release
9 claim is 'based on the identical factual predicate.'"

10 So the question about the scope of the release is
11 essentially a phantom. The release is specifically modified at
12 the end of that same set of clauses that Mr. Zigler referred
13 to, as modified by "sponsored stories." And this goes back to
14 this argument about the definition.

15 **THE COURT:** So, just being specific about it, the
16 program, it's called "social ads," is that the program that
17 Facebook has --

18 **MR. RHODES:** We're not sure what Mr. Zigler's
19 complaints really reaches. This case (Indicating) is about
20 sponsored stories.

21 **THE COURT:** Okay. So let me ask you: Is it your
22 position that -- is there -- there is a program called "social
23 ads"?

24 **MR. RHODES:** There are ads on Facebook that would not
25 meet the Facebook definition of "sponsored stories."

1 **THE COURT:** Okay.

2 **MR. RHODES:** Some of those ads have what you might
3 consider to have social content.

4 **THE COURT:** And is your view that the release in this
5 case reaches those -- any claims that arise out of those
6 programs?

7 **MR. RHODES:** My answer is I don't know until I have a
8 final judgment in this case, an operative complaint in another
9 case, and you comply with the *Hesse* factors (Indicating) as to
10 how you go about determining whether or not the release covers
11 the one or the other.

12 And that's why we gave you a definition, contrary to what
13 Mr. Michelman said, that is both in the title and in the
14 function of what a sponsored story was. It's not simple as
15 what Facebook calls a sponsored story. It is meant to be
16 broader than that. I'm entitled to that release. That's what
17 this case was about. We've described it for you three
18 different ways.

19 And if what Mr. Zigler ends up suing us about in his case
20 is, in fact, the same thing as what was covered by that
21 release, then I would submit to you, I would be well within my
22 grounds to say that case is dismissed. Indeed, his words to
23 you were prophetic, weren't they? He says it covers him.

24 But to say that it covers everything on Facebook, that's
25 too much. And I'm not saying that. I'm saying it covers

1 sponsored stories, as defined. And I can't speak to what he
2 may ultimately bring as a cause of action.

3 **MR. ARNS:** Your Honor --

4 **MR. ZIGLER:** Your Honor --

5 **THE COURT:** No, no. Thank you.

6 **MR. RHODES:** You dismissed that complaint, as you
7 know.

8 **THE COURT:** I know.

9 Go ahead.

10 **MR. ARNS:** If I can say this, Your Honor. Slide 51,
11 in anticipation of this argument, lays out again the definition
12 of "sponsored stories." And the release claims talk about
13 "sponsored stories." A sponsored story is a sponsored story.
14 We know the difference between different types of advertising
15 on Facebook. It's complicated. But this case dealt with
16 sponsored stories.

17 So -- and the great news, Your Honor, is that his case,
18 *CMD*, is allegedly coming in here for another objector.
19 Mr. Zigler also happens to be the attorney for CMD/Dawes, as
20 you know.

21 **THE COURT:** I'm aware of that.

22 **MR. ARNS:** And you know that that's in front of you.
23 That's the great thing, Your Honor. It is all in front of you.
24 So --

25 **THE COURT:** Well, that's -- whether or not that's

1 great is another story. But, okay. Well --

2 **MR. ARNS:** You will know the exact scope of this
3 release.

4 **THE COURT:** Yes.

5 **MR. ARNS:** And our case dealt with sponsored stories.

6 **THE COURT:** Okay.

7 **MR. RHODES:** The test in *Hesse*, Your Honor, is
8 whether there's identicity of the underlying factual pattern,
9 and not the names that are put in the release. That's the
10 point that the Ninth Circuit is trying to make.

11 **THE COURT:** Okay. Let me ask you on the point that
12 Mr. Frank brought up, and that is that the 3344 -- presence of
13 3344 actually works in a contrary fashion in terms of the
14 incentive payments because, if I was following his argument,
15 the -- with this Sword of Damocles over the representative
16 Plaintiffs, they have a vested interest, and a contrary
17 interest in some respects, to do a deal so they can get out
18 from under 3344, and, therefore, they are conflicted in some
19 sense as class representatives.

20 **MR. ARNS:** Your Honor, as their --

21 **THE COURT:** You can go first on this one, Mr. Arns.

22 **MR. ARNS:** Thank you very much, Your Honor.

23 As their attorney, I had numerous conversations with them
24 about this, that I'm not going to get into because of the
25 attorney/client privilege. And I can represent to you that the

1 spectra of 3344(a) fee shifting never stopped anything in our
2 prosecution of this case.

3 **THE COURT:** Well, you know, I'm sure that the -- the
4 counsel in *Radcliffe* would have said it didn't affect at all,
5 and perhaps it -- it never did

6 **MR. ARNS:** (Nods head)

7 **THE COURT:** But the question is more: Is there a
8 problem in terms of -- you know, as you know, often in conflict
9 situations, it doesn't mean the actual conflict was created and
10 impacted the situation. It's the presence of the potential
11 conflict that's the problem.

12 So, I'm perfectly willing to accept your representation
13 that not a single decision was made with the -- with the
14 particular concern to get class representatives out from under.
15 But his point is just, as -- if I was following you correctly,
16 just like in *Radcliffe*, there is an aspect of the reality that
17 puts those class representatives in a very different posture
18 than those they purport to represent, and that, therefore, they
19 have structurally an incentive to -- to agree when perhaps
20 that's not in the interest of the class who are not going to be
21 subject to a 3344 obligation.

22 **MR. ARNS:** Understood, Your Honor.

23 **THE COURT:** Okay.

24 **MR. ARNS:** You know, one of the things that Mr. Frank
25 said in his papers is that every one of these cases should have

1 been individual cases, everybody should have the right to
2 prosecute the 3344 issue, themselves.

3 And Mr. Frank, as we know, has never met a lawsuit that he
4 liked. Mr. Frank, when he comes in, he doesn't want the class
5 reps to get any money because that promotes class actions.

6 **THE COURT:** Well, but that doesn't really matter, for
7 purposes of my question. He's -- I don't care what his
8 motivation is for presenting a particular argument. My
9 question is to address the argument, itself.

10 I have -- I -- it's triggered the thought in my mind that
11 there is an issue at least to be addressed with respect to
12 whether or not that puts the class representative in a very
13 different posture in a 3344 situation.

14 And so I want you to address that. Not why he may have
15 made the argument, or his grand view on the -- on the facility
16 of class actions.

17 **MR. ARNS:** Yes. Your Honor, what I would say is that
18 was probably one of the 100 factors that are used in this --
19 that were used in this case to make a determination whether, on
20 two days before the class cert hearing was going to take place,
21 whether we could hammer out a deal. That was something that
22 was discussed.

23 But how do you get away -- how could there ever be a class
24 rep in this type of case?

25 **THE COURT:** I'm not sure.

1 **MR. ARNS:** And the point is, I don't see a conflict
2 there. And that's why people have to step forward. We had
3 amazing class reps. We had people who were very devoted to
4 this cause, and were willing to take on the cause.

5 **THE COURT:** None of that is -- I'm not, for purposes
6 of this question, questioning any of that. They could be the
7 greatest class representatives of all times.

8 The question is a structural question, and that is what
9 I'm trying to get a handle on. I'm not suggesting that I think
10 it does create that conflict, but it's an interesting issue in
11 a 3344 case.

12 **MR. RHODES:** He's trying to erect a structural
13 disincentive argument. He's saying that there's a structural
14 built-in disincentive to take the case to distance.

15 **THE COURT:** Right.

16 **MR. RHODES:** He's wrong factually because, unlike
17 *Experian*, the *Radcliffe* case, where there was a built-in
18 *de jure* condition that the court didn't like, here there was
19 the opposite.

20 Section 2.7 of the amended settlement agreement says,
21 whatever incentive award -- because that has to be the *quid pro*
22 *quo* that he's trying to generate here -- "I took a larger
23 incentive award to shirk myself from that exposure." That's
24 his argument, I think. And he says that's a structural bias
25 that you can never run away from.

1 The fact of the matter is --

2 **THE COURT:** I don't hear it that way. I don't hear
3 it as controlling the amount of the incentive award. I hear it
4 more as an interesting issue as to whether or not, because of
5 the nature of 3344, a class representative has different,
6 different issues.

7 **MR. RHODES:** Give up the ghost earlier, right? Isn't
8 that the argument?

9 **THE COURT:** Yes.

10 **MR. RHODES:** But the fact of the matter is: When the
11 did the case settle? It settled after seven expert reports.
12 Thousands of documents were produced. Full-scale litigation,
13 motions to dismiss. Rulings. Fully-briefed class cert. We
14 were two days before the hearing.

15 This case settled when you want it to settle. Fully
16 discovered, fully investigated, fully litigated.

17 **THE COURT:** Of course, the other answer, perhaps, is
18 that 3344 is there. So if it is, in fact, such a sword of
19 Damocles, no one would be -- step forward to be a class
20 representative.

21 So, the fact that they stepped forward is somewhat
22 indicative of the fact that it is not the reason that the class
23 will be sold out by the class representatives.

24 **MR. RHODES:** Right. And, what -- I'm making the
25 point that the fact that they litigated it to the extent they

1 did, knowing that the fees on the other side are accruing all
2 the time -- I mean, the fact of the matter is, for an
3 individual in a class action, the cost bill, if it has to
4 shift, that, in itself, in a fully-lited litigated case, is
5 going to be sufficient. And there's no case law to suggest
6 that.

7 **THE COURT:** Okay. Let's now talk about the
8 objectors' points with respect to the minor subclass, and then
9 we will -- I want to move to the fees issue right at the end.
10 So --

11 **MR. RHODES:** So, there are two points that were
12 raised, I thought, which is: We need to have separate
13 representation for them, and that there wasn't symmetry of
14 interests. I think I already identified for you a whole host
15 of factors on the latter.

16 Let me tell you a story about W.T. He's a named
17 representative Plaintiff. He's a minor. His father and him
18 sat at a computer one day, and signed up for Facebook. And
19 they did it together. The father opened a Facebook account,
20 and W.T. opened a Facebook account.

21 We took their depositions. And we asked them, "Did you
22 have your dad's consent?" Because the heart of these arguments
23 all go to: Did you get consent; what kind of consent; was it
24 implied; was it express?

25 But this is what's telling about whether this settlement,

1 from the standpoint of the minor class, is fair, reasonable,
2 and adequate. Mr. Tate, the father, said at his deposition, he
3 couldn't even remember who pushed the button. He looked over
4 his son's shoulder as they signed up together. They went
5 through the flow, they looked at the documents. They had done
6 research before because he was very concerned, as a parent,
7 about what would be involved with having his teenage son on
8 Facebook. And they went through that flow together. And then
9 he joined Facebook, himself. And then they friended each
10 other, so the father could then monitor the son.

11 That man and his son stand up here today, in Court, and
12 say, "This is a fair, reasonable, and adequate settlement."

13 He was the most informed actor on this stage because he
14 represented the very crux of what this case was about: "What
15 is going to happen to my minor child on Facebook?"

16 He signed up with his son, he approved it, he consented to
17 it. And I will submit to you that he is a lot better judge of
18 whether this settlement is fair, reasonable, and adequate for
19 the purposes of the minors, and whether there's some
20 distinction between minors and parents than these professional
21 objectors, Your Honor.

22 **THE COURT:** What I hear the objectors saying, though,
23 is that that scenario you just described is -- that's
24 wonderful, that's the way -- it would be great if it always
25 worked that way. But the injunctive relief terms here don't

1 always mean it's going to work that way.

2 **MR. RHODES:** No system is perfect. But, you know
3 what? If we were trying this case -- which it seems is what
4 Mr. Frank wants me to do, spend a bunch of my clients' money
5 out in the audience -- and I'm glad they're here to hear
6 that -- and try the case, would you be empowered as a judge?
7 Could you, as a remedy, order me to create that new tool that
8 tells you what sponsored stories you have been to? Could you
9 order me, as a remedy, the things that Mr. Arns negotiated for?
10 Could you order me to put a tool inside the parent's account to
11 delete their minor child from all sponsored stories going
12 forward? Could you order me to give a tool to a parent who is
13 not on Facebook?

14 Remember, that's lost in the shuffle here. If you're a
15 parent and you're not on Facebook, I'm going to give you a tool
16 now to come into the ecosystem and default your child.

17 Can you order me to do that? Or are those the kinds of
18 injunctive relief you can only get through a negotiated
19 arms-length non-collusive settlement?

20 **MR. ARNS:** Your Honor, you have the mockups of the
21 injunctive relief. We haven't even had a chance to go through
22 those.

23 **THE COURT:** I have them, though.

24 **MR. ARNS:** Yes. And we negotiated very hard to get
25 that, because we wanted the minors to do the right thing.

1 And this settlement allows the minors to do the right
2 thing. And that is, say exactly what their age is. As opposed
3 to finding out if there's going to be an e-mail to my mom and
4 dad every day. And that would never work, in a million years.
5 They're just going to say they're a different age.

6 So, there's a lot of issues at play here, Your Honor. And
7 that's how our negotiation worked.

8 And also, with Mr. Frank, with Mr. Fellmeth, would they be
9 willing to take on this case, going back to 3344? Do they want
10 to put \$20 million in trust? Do they want to ensure that there
11 is going to be the same amount of injunctive relief that the
12 Court cannot order? Do they want to be subject to the 3344 fee
13 and cost shifting, and take over this case?

14 I had a case in Oregon one time, Your Honor, that I
15 settled for about \$4 million. It was a death case. And we had
16 the clients basically -- we had the waiver of the conflict --

17 **UNIDENTIFIED MAN:** Objection, Your Honor.

18 **THE COURT:** Don't -- no, audience comments are not
19 part of the proceedings.

20 Go ahead, Mr. Arns.

21 **MR. ARNS:** And the court had to approve it, even
22 though minors weren't involved. Then the attorneys came on to
23 settle the proration of who would get what, the wife or the
24 parents.

25 And basically what happened, Your Honor, is the attorneys

1 came in for the parents and said, "It was the worst settlement
2 in the world, you didn't get enough money. You should have got
3 a lot more."

4 And I said, "Fine. Put \$4 million in trust, take over the
5 case."

6 Next day, "This is a fantastic settlement."

7 There's no skin in the game with these objectors. And
8 when we talk about the issues, we -- we have developed this so
9 the minors, going back to the minors, gone through all the
10 issues before, so they can do the right thing.

11 And we believe this will set the appropriate standard for
12 Google Plus and every other social media site that exists.

13 **MR. RHODES:** Your Honor, let me just make a final
14 rhetorical point to you.

15 I was struck by the Schachter objectors and some of the
16 other objectors. And they're complaining, as you point out,
17 that they really want to engineer new social policy in this
18 realm.

19 But the Court should be asking himself: Why didn't they
20 just opt out then?

21 **MR. ARNS:** I would --

22 **MR. RHODES:** Why don't they opt out? If this is such
23 a terrible deal, opt out, bring your individual cause of action
24 and see what happens under 3344.

25 Because I'm going to go back to Judge Koh, in her ruling

1 on Page 29 (As read) :

2 "To win..."

3 She says to survive, they're going to have to prove,
4 quote:

5 "...proveable commercial value to their name and
6 likeness."

7 And that is what became untenable in this case. And as
8 the case was litigated and the parties realized that
9 fundamentally the notion that you could prove that for a
10 noncelebrity endorsement, which is the heart of this case, it
11 doesn't ultimately end up being a case that has the merits that
12 these people want you to believe.

13 **MR. ARNS:** I disagree with that, Your Honor.

14 **THE COURT:** I understand, I understand. And that is
15 well-covered in the briefs. And I recognize that each side
16 still has a very strong view of the merits of the case and the
17 defenses, and I understand that.

18 So let's now address the fee issue, and we will call it a
19 day.

20 **MR. RHODES:** For your benefit, Your Honor, we have
21 said what we have to say on the subject in our brief.

22 **THE COURT:** Yes, thank you. And I have reviewed your
23 presentation.

24 So, Mr. Arns.

25 **MR. ARNS:** Yes. Your Honor. With respect to the

1 discovery in this case, Slide 15 sets forth all the discovery.
2 It's all fully been briefed.

3 There was a lot of futile jousting that went on in this
4 case, Your Honor. We were trying not -- to knock each other
5 off our horses. This was not pretty discovery. Twenty-one
6 depositions, over 200,000 pages of documents, and multiple
7 briefs having to do with every subject. This was a very
8 hard-fought case. And Facebook knew we learned it all. We
9 also knew that we could try this case. This case was ready to
10 try.

11 If we go to Slide No. 16, expert discovery, Your Honor --

12 **THE COURT:** Why shouldn't this -- and let me
13 introduce my question by stipulating, for purposes of this
14 discussion, that a great deal of work was done at a very high
15 level from the perspective of the lawyering that went on.

16 Why shouldn't this be a lodestar case, and not a
17 percentage of the fund?

18 And you know that I have some problems with the -- with
19 the valuation placed on the injunctive relief. So, why
20 shouldn't this be approached from the lodestar perspective?

21 **MR. ARNS:** It could be approached from the lodestar,
22 but we're still going to ask for a multiplier, Your Honor, on
23 that.

24 And if I could just say one thing. If you want to take
25 the state standard or federal standard on that, we can approach

1 it many different ways. We can have a lodestar crosscheck to
2 the percent. And that could work. But we're going to ask for
3 that multiplier.

4 One of the things that happened, Your Honor, in our expert
5 depositions, there was another firm brought in. Facebook hired
6 another law firm. The Cooley firm had represented some of the
7 expert witnesses. Gibson & Dunn was brought in for other
8 expert witnesses.

9 Now, I did all of those depositions, all of the
10 preparation, all of the questioning of the defense experts.
11 And what happened -- I considered that a tremendous compliment,
12 Your Honor, that they had to -- that Facebook had to bring in
13 another firm.

14 That being said, let me just say this: If I had a social
15 media company and I got in a problem, I would hire the Cooley
16 team to represent me. I don't think they had to bring in
17 Gibson & Dunn.

18 And there have been comments, when we talk about fees, the
19 small firm versus the large firm, the different overhead, they
20 don't know what overhead is, Your Honor, of large firms,
21 because everything is paid for by the client. Nothing is paid
22 for by any clients, as a plaintiffs' contingency lawyer, which
23 I've done all my life. And I'm very proud to be in that
24 situation, Your Honor. And --

25 **THE COURT:** So it's not just a question of how much

1 the other side paid. The corporate defendant makes its own
2 decision about how much it is going to pay for its lawyers, and
3 that is their business.

4 **MR. ARNS:** That's correct.

5 **THE COURT:** The reason your fees are my business is
6 because you are proposing to have it come out of the fund that
7 goes to the class members.

8 **MR. ARNS:** That's correct, Your Honor.

9 **THE COURT:** So that's why I am focused on yours. So,
10 the fact that there may be very expensive lawyers on the other
11 side goes -- is really not -- it is -- I can see why you point
12 to it, to say this is a very complicated, difficult case, and
13 that you were against formidable opponents. And that is a fair
14 point.

15 But, how much these firms charge the corporate defendant
16 is really not particularly of consequence in terms of assessing
17 your fees, I don't think.

18 **MR. ARNS:** Well, Your Honor, the question is: Is it
19 a question of what I am worth? And I would be glad to have an
20 in-camera session, showing you my last ten years of tax
21 returns. I would be happy --

22 **THE COURT:** One of the concerns that is expressed in
23 Facebook's brief is that there isn't -- and I know, for senior
24 counsel who are experienced, it can be frustrating, but in
25 terms of declarations that support various billing rates, I

1 don't have that.

2 **MR. ARNS:** We do, Your Honor, we have submitted two
3 declarations of that.

4 **THE COURT:** Okay. Which ones?

5 (Off-the-Record discussion between counsel)

6 **MR. ARNS:** Yeah, the Richard Pearl declarations, we
7 have two of those, Your Honor, that lay it out.

8 **THE COURT:** You are talking about in this community,
9 comparable work, and the like? I'll go back and look at it.

10 **MR. ARNS:** Exactly. And, you know, in my 38 years of
11 experience, if it's getting down to my billing rates,
12 Your Honor, I don't think anybody has done more Masters in
13 Trials presentations than I have, in ABOTA.

14 I've written two best-selling treatises for The Rutter
15 Group, which I think is the best California legal publisher,
16 *The Evidence Wheel* and *The Trial Wheel*, which is federal and
17 state version, Your Honor, both; that basically I have been
18 practicing for 38 years.

19 The largest plaintiff trial bar in the United States is
20 the Consumer Attorneys of California. I have been nominated as
21 Trial Lawyer of the Year numerous times; been Trial Lawyer of
22 the Year, San Francisco Trial Lawyers; a professor at the
23 University of San Francisco Law School, and was Professor of
24 the Year, teaching trial practice for the last 15 years, or
25 12 years.

1 I have numerous succession of cases, of victories that
2 aren't -- I don't know if anybody else has, in trials. With
3 respect to class actions, I've done approximately 17 of them
4 now; none have gone to trial.

5 **THE COURT:** I'm focusing now on the rates. All of
6 this is in the pleadings, --

7 **MR. ARNS:** That's correct, Your Honor.

8 **THE COURT:** -- and I'll go through it. What I should
9 do, whoever -- whichever objector wanted to make a specific
10 comment with respect to the fees, and there was one --

11 **MR. ARNS:** Yes.

12 **THE COURT:** I'll let whoever that is come up, very
13 briefly, and make whatever particular objection. I have a very
14 lengthy submission -- come forward -- from Facebook on the
15 fees, and so I have a good deal of information already, but I
16 will -- and I'll let you respond, Mr. Arns.

17 **MR. ARNS:** Thank you.

18 **THE COURT:** But, let's go ahead. And remind me
19 again, sir, your --

20 **MR. SHERWOOD:** Thank you, Your Honor. My name is
21 Alan Sherwood. I'm appearing for objector Jennifer Deachin.

22 **THE COURT:** Yes.

23 **MR. SHERWOOD:** At this point, Your Honor I'll submit
24 on the briefs that have been submitted.

25 **THE COURT:** Very well.

1 **MR. SHERWOOD:** It's a late hour; we've had a lot of
2 argument.

3 **THE COURT:** Thank you. Go ahead, Mr. Arns.

4 **MR. ARNS:** Your Honor, again, the hallmark of our
5 settlement is the injunctive relief.

6 Now, Mr. Kevin Osborne, one of the attorneys in my office
7 who has a master's degree in economics, I would like him to
8 spend one minute just addressing the option method of
9 evaluating.

10 **THE COURT:** Okay.

11 **MR. ARNS:** He knows a little bit more about economics
12 than I do, Your Honor. Whenever I call an economist in to
13 trial, they don't even like me to ask questions, because I have
14 a little problem with it.

15 **THE COURT:** Very well.

16 **MR. OSBORNE:** Thank Your Honor. Kevin Osborne for
17 the Plaintiffs. Good afternoon.

18 **THE COURT:** Good afternoon.

19 **MR. OSBORNE:** I'll cut to the chase. What we have
20 presented to the Court was a series of economic models for
21 valuing the injunctive relief in this case.

22 All economic models rely on foundations. And in this
23 particular instance, there are three foundations -- three
24 pillars of the foundation for all of our economic models.

25 First, the idea behind the case was that Facebook, through

1 its sponsored stories programs, was misappropriating
2 endorsements of users. The question that follows that is
3 whether an endorsement is worth any money. If it's a valuable
4 asset. And the answer must be yes, because Facebook was
5 driving its ad revenues through the use of sponsored stories
6 because they have a high CTR, because this is the holy grail of
7 advertising. This is what advertisers want, and they'll pay
8 more money for it.

9 So, assuming those two pillars to be true, the next pillar
10 would be since the thrust of our injunctive relief is giving
11 control of this asset to the users, have we given control of a
12 valuable asset to the users?

13 Now, based on the fact that sponsored stories derive -- or
14 deprive --

15 **THE COURT:** Value, of course, is only limited to the
16 particular network that the user has decided to create within
17 the Facebook world. We're not talking about celebrities,
18 right?

19 **MR. OSBORNE:** That's absolutely true. And that leads
20 to the question of: So what? If it is a valuable asset, what
21 is an individual user who is not a celebrity going to do? If
22 they discontinue their use of sponsored stories, are they going
23 to then go sell their endorsement to someone else?

24 **THE COURT:** If the likeness has no value in the
25 marketplace, other than the -- the network created by that

1 particular individual, the models of that -- that's where I
2 continue to have difficulty seeing how you can simply look at
3 and -- take an example, you know, Facebook achieves a \$1 profit
4 from using my name within the network that I have.

5 And you then say, well, that's the value to me, I get the
6 dollar, I get a subset of the dollar. And I -- I don't think
7 one flows from the other. It's easy with a celebrity or
8 somebody who is marketing their likeness. But we are in a very
9 different world.

10 And I'm not saying I wouldn't necessarily, at the end of
11 the day, find that there was some value. But --

12 **MR. ARNS:** Your Honor.

13 **THE COURT:** -- these theories all seem to just take
14 -- to operate in a marketplace that is not this marketplace.

15 **MR. ARNS:** The brilliant thing that occurs on
16 Facebook, Your Honor, is they get the friend endorsement. And
17 the friend endorsement -- the sponsored stories only go to
18 friends, or you can dictate who you want it to go to. You can
19 dictate you don't want it to go to your parents, or it can go
20 to your parents. But the point is -- or friends in a certain
21 group.

22 The point is Facebook knows and online media operations
23 know the best endorsement is the friend endorsement, not a
24 celebrity.

25 **THE COURT:** That is again focusing entirely on the

1 benefit to Facebook. Where's the harm to the user? Where is
2 the harm?

3 **MR. ARNS:** Okay. This is not a benefit to Facebook.
4 This is a benefit, first of all, to the advertiser. And
5 they're willing to pay the money because they want your friend
6 endorsement.

7 And that's why we determined that there are damages on
8 that. And that we got by the harm in this case, Your Honor.
9 And that's why this injunctive relief, having control over that
10 is extremely valuable. And, we would request that you put --
11 that you say it's extremely valuable, difficult to evaluate.
12 We think this option value is the way to go on it, Your Honor.

13 And --

14 **THE COURT:** That's your -- you've got a fair market
15 value and a real option value and a minimum value. So you're
16 saying the real option value is your preferred method.

17 **MR. ARNS:** Yes. And that's Slide No. 44, Your Honor.

18 Again, Judge Davila specifically stated -- we have the
19 cite for that -- that you have to look at the value of the
20 injunctive, also.

21 But at any rate, Your Honor, we're past time. Thank you
22 very much. We submit. And --

23 **THE COURT:** Very well.

24 **MR. ARNS:** Appreciate it.

25 **THE COURT:** Thank you. Very good argument. And I'll

1 go back and do my work, and give you an order.

2 **MR. RHODES:** Thank you, Your Honor.

3 **THE COURT:** Thank you.

4 (Conclusion of Proceedings)

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CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Belle Ball

Thursday, November 21, 2013

Belle Ball, CSR 8785, CRR, RDR